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Frederick Mark Gedicks

Pasquale Annicchino

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CROSS, CRUCIFIX, CULTURE: AN APPROACH TO THE CONSTITUTIONAL MEANING OF CONFESSIONAL SYMBOLS

FREDERICK MARK GEDICKS*
PASQUALE ANNICCHINO**

ABSTRACT

In the United States and Europe the constitutionality of government displays of confessional symbols depends on whether the

* Guy Anderson Chair & Professor of Law, Brigham Young University Law School, Provo, Utah; Visiting Research Fellow, ReligioWest, Robert Schuman Centre for Advanced Studies, European University Institute, Florence, Italy, November - December 2012. J.D., University of Southern California; B.A. (economics), Brigham Young University.

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** Research Fellow, Robert Schumann Centre for Advanced Studies, European University Institute, Florence, Italy; Adjunct Professor, Brigham Young University Law School, Winter Semester 2013 & Fall Semester 2014. Ph.D. (law), LL.B., University of Siena, Italy; LL.M. (European public law), University College London; LL.M./D.E.A., European Academy of Legal Theory, Brussels, Belgium.

symbols also have nonconfessional secular meaning (in the United States) or whether their confessional meaning is at least absent (in Europe). Yet both the United States Supreme Court (USSCt) and the European Court of Human Rights (ECtHR) lack a workable approach to determining whether secular meaning is present or confessional meaning absent.

The problem is that the government can nearly always articulate a possible secular meaning for the confessional symbols that it uses, or argue that the confessional meaning is passive and ineffective. What matters, however, is not the *possibility* that secular meaning is present or confessional meaning absent, but whether this presence or absence is historically and culturally authentic. Courts largely ignore this, routinely appealing to history and culture to justify government use of confessional symbols without undertaking a serious investigation of either one.

Drawing on the work of C.S. Peirce, we propose that courts ask three successive questions in religious symbol cases:

- (1) Is the ordinary meaning of the symbol confessional or otherwise religious?
- (2) Does the immediate context in which the symbol is displayed suggest a possible historical, cultural, or other secular meaning?
- (3) Is this alternate secular meaning authentically present and genuinely recognized in the history and culture of the place where the symbol is displayed?

We illustrate this approach with *Salazar v. Buono*, in which the USSCt upheld government display of a Christian cross, and *Lautsi & Others v. Italy*, in which the ECtHR deferred to Italian court decisions upholding government display of a Catholic crucifix. While the USSCt in *Buono* and the Italian courts in *Lautsi* imagine conceivable nonconfessional meanings for the confessional symbol at issue, neither meaning can be found in American or Italian history or culture. In *Lautsi*, therefore, the ECtHR ends up deferring to an Italian “tradition” that doesn’t exist.

Judicial denial of obvious confessional meaning and invention of substitute secular meanings for confessional symbols betrays a cultural schizophrenia: majoritarian religions rail against the secularization of culture and its subversion of belief, yet they insist that their confessional

symbols remain at home in this culture. But confessional symbols no longer fit in mainstream culture as *confessional*—hence the characterization of their meanings as secular or passive, even and especially by the majoritarian religions that use them. Ironically, judicial secularization or minimization of the meaning of these symbols to validate their use by government is likely to accelerate and entrench the very secularization that such religions deplore.

INTRODUCTION: DIMENSIONS OF RELIGIOUS SYMBOLIC MEANING

Under the constitutional norms of both the United States and Europe the critical inquiry when a government displays a religious symbol is what the symbol means. Symbolic meaning that coerces or endorses religion violates the United States Constitution's Establishment Clause,¹ while meaning that threatens religious pluralism or minority religious liberty violates the European Convention on Human Rights (the "Convention").²

1. U.S. CONST. amend. I, cl. 1 ("Congress shall pass no law respecting an establishment of religion . . ."); *e.g.*, *McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) (finding that government's desire to endorse Christianity motivated display of Ten Commandments in county courthouse); *Lee v. Weisman*, 505 U.S. 577 (1992) (finding that government-sponsored graduation prayer psychologically coerced students and their families to participate in a religious ceremony); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) (holding that display of Christmas nativity in county courthouse constituted endorsement of Christianity); *Stone v. Graham*, 449 U.S. 39 (1980) (finding that display of Ten Commandments in public school might coerce Christian belief in impressionable schoolchildren).

2. *See* European Convention for the Protection of Human Rights and Fundamental Freedoms art. 9, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter *European Convention*].

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Id.

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical convictions.

In the United States and Europe, then, the legality of government display of a religious symbol depends on whether the symbol possesses nonconfessional significance or, at least, lacks meaningful confessional significance. Yet both the United States Supreme Court (USSCt) and the European Court of Human Rights (ECtHR) lack a workable approach to the crucial determination whether the required secular meaning is actually present or the prohibited confessional meaning really absent.

Two recent religious symbol cases illustrate the doctrinal problem. In *Salazar v. Buono*,³ a plurality of the USSCt rested its decision on the purportedly secular meaning of a large white Latin cross at a World War I veterans memorial located in the midst of a vast tract of federal park land. The plurality denied that the cross symbolized only

Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol No. 1), art. 2 (1952), *available at* <http://conventions.coe.int/treaty/EN/treaties/html/009.htm>.

The European Convention, of course, contains no anti-establishment clause, but numerous scholars have observed that ECtHR decisions and other sources of law in the EU have been steadily converging on such a norm. *See, e.g.*, Claudia E. Haupt, *Transnational Nonestablishment*, 80 GEO. WASH. L. REV. 991 (2012) [hereinafter Haupt, *Transnational Nonestablishment*] (arguing that ECtHR decisions, the European Convention, the EU Charter of Fundamental Rights, the Constitution for Europe, and other EU sources of law have converged on a nonestablishment norm); *see also* Silvio Ferrari, *State Supported Display of Religious Symbols in Public Space*, 52 J. CATH. LEGAL STUD. 7, 11–12 (2013) (observing that European countries deal with religious symbols by wholly secularizing public space (France), characterizing the dominant religion as underwriting the cultural identity of the country (Italy) or prohibiting government use of symbols but permitting their display by government employees (UK)); Susanna Mancini, *Taking Secularism (not too) Seriously: the Italian “crucifix case”*, 1 RELIG. & HUM. RTS. 179, 180 (2006) (arguing that “a secular state is the pre-condition for any functional religious accommodation and for the protection of minority religions and convictions.”); RELIGARE BACKGROUND DOCUMENT 19 (Nov. 2012), <http://www.religareproject.eu> (arguing that EU country practices relating to law and religion should be governed by a normative principal of “inclusive even-handedness”).

3. *Buono v. Norton*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff’d*, 371 F.3d 543 (9th Cir. 2004), *on motion to enforce judg.*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended & superseded on denial of reh. en banc*, 527 F.3d 758 (9th Cir. 2008), *rev’d and remanded sub nom. Salazar v. Buono*, 559 U.S. 700 (2010).

Christianity and the Christian resurrection, insisting that it additionally memorialized the sacrifices of U.S. military veterans.⁴

In *Lautsi and Others v. Italy*,⁵ Italian courts found that crucifixes posted in public school classrooms signified the Christian roots of liberal democracy rather than Roman Catholicism; a Grand Chamber of the ECtHR then held under the margin-of-appreciation doctrine that this practice did not violate the Convention or threaten related principles of religious pluralism or minority religious liberty because the crucifix is a mere “passive” symbol that exerts no effect on non-Catholic students in the absence of other evidence of religious coercion.⁶

4. 559 U.S. at 721 (Kennedy, J., plurality opinion); see also *Buono v. Kempthorne*, 527 F.3d 758, 765 (9th Cir. 2008) (O’Scannlain, J., dissenting from denial of rehearing en banc) (“While the cross at Sunrise Rock takes the form of an ordinarily religious symbol, it serves the secular purpose of memorializing fallen soldiers. . . . [T]he lack of *any* challenge to the Sunrise Rock memorial for *seven decades* surely demonstrates that the public understands and accepts its secular commemorative purpose.”) (emphasis in original).

5. TAR Veneto prima Sez. I, 13 novembre 2003, Sent. N. 56/04, Ric. No. 2007/02, *referral remanded for lack of juris.*, Corte Cost., 13 dicembre 2004, Ordinanza N. 389, *on remand*, TAR Veneto prima Sez. III, 17 marzo 2005, Sent. N. 1110/2005, Ric. N. 2007/02, *aff’d*, Cons. Stato, 13 gennaio 2006, Decisione N. 556/06, N. 7314/2005 Reg. Dec., *rev’d in part sub nom.* *Lautsi v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2009) [hereinafter *Lautsi*], *rev’d sub. nom.* *Lautsi & Others v. Italy*, App. No. 30814/06, Eur. Ct. H.R. (2011) [hereinafter *Lautsi & Others*]; see also *Lautsi v. Italy: English Translations of Italian Administrative Trial & Appellate Opinions*, <http://ssrn.com/abstract=2361188> (Fredrick Mark Gedicks & Pasquale Annicchino trans. Nov. 17, 2013) [hereinafter *Lautsi – English Translations*].

6. *Lautsi & Others*, at 29 ¶¶ 70, 72 (internal cross-reference omitted).

For a pointed critique of the position that religious symbols are “passive” signs that exert no material effect on unbelievers or adherents to other religions, see Claudia Haupt, *Active Symbols*, 55 B.C. L. REV. 821, 822 (2014) [hereinafter Haupt, *Active Symbols*] (“Characterizing religious symbols as passive is descriptively inaccurate, doctrinally incoherent, and analytically unsound.”).

The “margin of appreciation” doctrine permits the ECtHR “to assume, on certain issues, an attitude of deference with respect to decisions of [contracting] States that apparently impact rights guaranteed” by the Convention. Pasquale Annicchino, *Tra Margine di Apprezzamento e Neutralità: Il Caso «Lautsi» e I Nuovi Equilibri della Tutela Europea della Libertà Religiosa*, in *DIRITTO E RELIGIONE IN EUROPA* 179, 181 (Roberto Mazzola ed. 2012) (authors’ translation). The ECtHR generally uses the doctrine to avoid making a definitive rule with respect to questions that are particularly complicated or controversial or as to which the contracting states have not reached consensus. *Id.* at 182. For a general introduction,

The plurality opinion in *Buono* and the opinions of the Italian courts in *Lautsi* depend on whether the confessional symbol in each case actually had the nonconfessional meaning and effect asserted for it, while the Grand Chamber's opinion depends on the absence of any religious symbolic meaning at all. None of these courts, however, made a persuasive case for the presence or absence of the meaning and effect on which everything seemed to depend.⁷ The *Buono* plurality's contention that the veterans memorial cross also signified *secular* honor of military sacrifice is the classic *ipse dixit*.⁸ The Italian courts did little better, baldly asserting a secular cultural-historical meaning that supposedly

see G. LETSAS, A THEORY OF INTERPRETATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (2007).

In applying the margin-of-appreciation doctrine, the ECtHR accepted Italy's self-serving representation that its public schools are models of religious pluralism, neutrality, and minority liberty. *Lautsi & Others*, at 30 ¶ 74 (internal citation omitted). Commentators have criticized this credulous account of the treatment of religious minorities (and especially Muslims) in Italian public schools. See, e.g., Allison Mawhinney, *Crucifixes, Classrooms and Children: A Semiotic Cocktail*, in THE LAUTSI PAPERS: MULTIDISCIPLINARY REFLECTIONS ON RELIGIOUS SYMBOLS IN THE PUBLIC SCHOOL CLASSROOM 93, 109–10 (Jeroen Temperman ed., 2012) [hereinafter THE LAUTSI PAPERS]. But see S. Ferrari, *supra* note 2, at 21–22 (“Today, not only Christmas but also the end of Ramadan and other religious holidays are celebrated in Italian schools.”).

7. See Thomas C. Berg, *Can State-Sponsored Religious Symbols Promote Religious Liberty?*, 52 J. CATH. LEGAL STUD. 23, 43 (2013) (“[T]he Italian courts offered a selective and contestable interpretation of Christianity that, they said, served as the ground for religious freedom and *laicità*.”); S. Ferrari, *supra* note 2, at 16 (“[T]he Italian courts’ insistence on the exclusively cultural significance of the classroom crucifix is the most unsatisfactory element of their reasoning on the question.”).

It is sometimes argued that the purely religious or confessional meaning or effect of a symbol need not invalidate its use by government. See, e.g., *McCreary Cnty. v. ACLU*, 545 U.S. 844, 893 (2005) (Scalia, J., dissenting) (arguing that Establishment Clause permits government endorsement of monotheism and disregard of polytheists and unbelievers); cf. ANDREW KOPPELMAN, DEFENDING AMERICAN RELIGIOUS NEUTRALITY (2013) (same with respect to “religion in general” when articulated at a “high level of abstraction”). Because we take as a premise that the U.S. and European law requires that religious symbols be understood to have secular or (at least) nonconfessional meaning and effect when displayed by government, see *supra* notes 1–8 and accompanying text, we do not address these arguments.

8. BLACK’S LAW DICTIONARY 905 (9th ed. 2009) (“[S]omething asserted but not proved.”).

crowded out the ordinary Roman Catholic meaning of the classroom crucifix. The ECtHR, meanwhile, simply proclaimed that a classroom crucifix projects no confessional influence at all despite its status as the quintessential symbol of Italy's majority Catholic faith.⁹ Lacking in the USSCt and the Italian court cases was any serious investigation of whether the supposed "historical-cultural" meanings and effects attributed to cross and crucifix are real or imagined—that is, present and recognizable in American and Italian history and culture, or simply made-up to justify government use of the symbols. The courts appeal to history and culture in both cases, yet their historical and cultural findings are mere assertions or speculations, as if "history" and "culture" are properly invented in chambers.

Academic literature reflects the same problem. Commentary on government use of religious symbols is legion,¹⁰ much of it prompted by *Buono* and *Lautsi* themselves.¹¹ Like the USSCt and Italian courts,

9. *Lautsi & Others*, at 29 ¶ 72.

10. See, e.g., 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* 69–86 (2008); FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE: A CRITICAL ANALYSIS OF RELIGION CLAUSE JURISPRUDENCE* 65–80 (1995); KOPPELMAN, *supra* note 7, at 73–76; Lorie G. Beaman, *Battles over Symbols: The "Religion" of the Minority Versus the "Culture" of the Majority*, 28 J.L. & RELIG. 67 (2013); Gerard V. Bradley, *The Wren Cross Controversy: Religion and the Public University*, 49 WM. & MARY L. REV. 2217 (2008); Caroline Corbin, *Nonbelievers and Government Speech*, 97 IOWA L. REV. 347 (2012); B. Jessie Hill, *Putting Religious Symbolism in Context: A Linguistic Critique of the Endorsement Test*, 104 MICH. L. REV. 491 (2005) [hereinafter Hill, *Religious Symbolism*]; RonNell Andersen Jones, *Pick Your Poison: Private Speech, Government Speech, and the Special Problem of Religious Displays*, 2010 BYU L. REV. 2045 (2010); Douglas Laycock, *Government-Sponsored Religious Displays: Transparent Rationalizations and Expedient Post-Modernism*, 61 CASE W. RES. L. REV. 1211 (2011); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 S. CAL. L. REV. 495 (1986); Frank S. Ravitch, *Religious Objects As Legal Subjects*, 40 WAKE FOREST L. REV. 1011 (2005); Joshua D. Zarrow, Note, *Of Crosses and Crèches: The Establishment Clause and Publicly Sponsored Displays of Religious Symbols*, 35 AM. U. L. REV. 477 (1986). See also Timothy Zick, *Cross Burning, Cockfighting, and Symbolic Meaning: Toward a First Amendment Ethnography*, 45 WM. & MARY L. REV. 2261 (2004).

11. See, e.g., CARLO CARDIA, *IDENTITÀ RELIGIOSA E CULTURALE EUROPEA: LA QUESTIONE DEL CROCIFISSO* (2010); KOPPELMAN, *supra* note 7, at 75–76; Ian Bartrum, *Salazar v. Buono: Sacred Symbolism and the Secular State*, 104 NW. U. L. REV. 1653 (2010); Berg, *supra* note 7; Giuseppe Casuscelli, *Il crocifisso nelle*

however, commentators generally assume the presence of permissible historical-cultural meanings or the absence of prohibited confessional ones without seriously investigating either history or culture.¹² The

scuole: neutralità dello Stato e «regola della precauzione», OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE (July 2005), available at www.olir.it; Ilia Pasquali Cerioli, *Laicità dello stato ed esposizione del crocifisso: brevi note sul (difficile) rapporto tra la presenza del simbolo religioso nelle strutture pubbliche e il principio di separazione degli ordini*, OLIR: OSSERVATORIO DELLE LIBERTÀ ED ISTITUZIONI RELIGIOSE (July 2005), available at www.olir.it; S. Ferrari, *supra* note 2; Adam Linkner, *How Salazar v. Buono Synthesizes the Supreme Court's Establishment Clause Precedent into a Single Test*, 25 EMORY INT'L L. REV. 57 (2011); Christopher C. Lund, *Salazar v. Buono and the Future of the Establishment Clause*, 105 NW. U. L. REV. 1387 (2011); Mancini, *supra* note 2; Andrea Pin, *Public Schools, the Italian Crucifix, and the European Court of Human Rights: The Italian Separation of Church and State*, 25 EMORY INT'L L. REV. 95 (2011); Mary Elizabeth Roper, Note, *Secular Crosses and the Neutrality of Secularism: Reflections on the Demands of Neutrality and its Consequences for Religious Symbols—the European Court of Human Rights in Lautsi and the U.S. Supreme Court in Salazar*, 45 VAND. J. TRANSNAT'L L. 841 (2012); Vincenzo Turchi, *La pronuncia della Grande Chambre della Corte di Strasburgo sul caso Lautsi C. Italia: post nubile Phoebus*, STATO, CHIESE E PLURALISMO CONFESSIONALE (Oct. 2011), available at www.statoecheise.it; J.H.H. Weiler, *Freedom of Religion and Freedom from Religion: The European Model*, 65 ME. L. REV. 759 (2013); John Witte, Jr. & Nina-Louisa Arold, *Lift High the Cross?: Contrasting the New European and American Cases on Religious Symbols on Government Property*, 25 EMORY INT'L L. REV. 5 (2011).

An important collection of commentary on *Lautsi* is THE LAUTSI PAPERS, *supra* note 6.

12. See, e.g., CARDIA, *supra* note 11, at 112–22 (characterizing classroom display of crucifix as secular signifier of roots of Italian culture based on quotations from selected Italian liberals); Bartrum, *supra* note 11, at 1661–64 (speculating that the *Buono* plurality might have properly concluded that the cross had lost confessional meaning through display at military monuments and cemeteries); Beaman, *supra* note 10 (assuming nonexistence of “culture” used to justify government display of majoritarian symbols); Bradley, *supra* note 10, at 2262 (suggesting without demonstrating that the cross possesses “some meaning for everyone as an example or illustration of certain universal values,” like “love,” “sacrifice,” and perhaps “redemption”); Mawhinney, *supra* note 6, at 93 (asserting that Italy’s invocation of “historical-cultural” meaning for crucifix cynically deployed Catholicism to define Italian identity); Weiler, *supra* note 11 (asserting that crosses and crucifixes are symbols of national identity); Witte & Arnold, *supra* note 11, at 30, 52–53 (reading cases as permitting government display of confessional symbols because they have historical and cultural meaning, despite failure of cases to investigate history or culture); see also *Lautsi & Others*, at 38–43 (Bonello, J.,

doctrinal results are predictable: thinly sourced and ultimately unpersuasive judgments about purportedly present nonconfessional meanings (or purportedly absent confessional ones) that underwrite the validity of government displays of confessional symbols.

We propose that when the meaning of a confessional religious symbol is at constitutional issue, courts should ask three successive questions:

- (1) Is the ordinary meaning of the symbol confessional or otherwise religious?¹³
- (2) If so, does the immediate context in which the symbol is displayed suggest an alternate secular meaning for the confessional symbol?¹⁴
- (3) If so, is this alternate secular meaning authentically present and genuinely recognized in the history and culture in which the confessional symbol is displayed?¹⁵

In short, we are proposing a consistent procedure for determining the meaning of religious symbols, based upon their ordinary meaning,

concurring) (asserting that crucifix is customary secular symbol of Italian “cultural personality”).

Among the few exceptions are Ira C. Lupu & Robert W. Tuttle, *The Cross at College: Accommodation of Religion at Public Universities*, 16 WM. & MARY BILL RTS. J. 939 (2008) (detailing history of Wren cross displayed within chapel at state-owned College of William & Mary as basis for conclusion that display violated Establishment Clause); B. Jessie Hill, *Of Christmas Trees and Corpus Christi: Ceremonial Deism and Change in Meaning over Time*, 59 DUKE L.J. 705 (2010) [hereinafter Hill, *Ceremonial Deism*] (arguing that before a facially religious text may be constitutionally used by government, it should be proved to have lost its confessional force by a specific demonstration of history).

Finally, a few commentators have suggested the relevance of historical or cultural analysis without specifying its analytical significance. See, e.g. Linkner, *supra* note 11, at 75–78 (suggesting history as a supplement to the endorsement test); Mark L. Movesesian, *Crosses and Culture: State-Sponsored Religious Displays in the US and Europe*, 1 OXFORD J.L. & RELIG. 338 (2012) (arguing that differing U.S. and European doctrines for confessional symbols reflect different cultural conceptions about the social purpose of religion).

13. See *infra* Part I.A.

14. See *infra* Part I.B.

15. See *infra* Part I.C.

their immediate context, and their place in the culture and history of the country in which they are displayed.

Buono and *Lautsi* exemplify the problems that arise from the failure to carefully and systematically explore these dimensions of religious symbolic meaning,¹⁶ and illustrate deeper trends of secularization and acculturation highlighted by the historical-cultural dimension.¹⁷ We close with the suggestion that attempts by traditionally dominant religions to defend government use of their confessional symbols by manufacturing “secular” meanings or denying obvious confessional ones only undermine authentic religious belief and hasten the social irrelevance of such religions.¹⁸

I. THREE MODES OF SYMBOLIC MEANING

American pragmatist Charles Sanders Peirce provided a useful vocabulary for the dimensions of symbolic meaning. Peirce maintained that a sign “conveys to the mind an idea about a thing,”¹⁹ in three ways. First, likenesses or “icons” imitate the things they represent, like a photograph, an architectural plan, or certain Egyptian hieroglyphics.²⁰ Second, “indications” or “indices” are linked to some thing or effect in the world, like a street sign to the street it marks, smoke with fire, or a greeting with the person to whom it is directed.²¹ Finally, “general signs,” “tokens,” or “symbols”—Peirce used all three terms interchangeably—possess a significance acquired by custom, usage, or convention, like a police officer’s badge (signifying civil authority), a

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Conclusion.

19. 2 CHARLES SANDERS PEIRCE, *THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS* (1893-1915) 5 (Peirce Edition Project ed., 1998); *accord* 1 CHARLES SANDERS PEIRCE, *THE ESSENTIAL PEIRCE: SELECTED PHILOSOPHICAL WRITINGS* (1867-1893) 225 (Nathan Houser & Christian Kloesel eds., 1992) (“A sign is in a conjoint relation to the thing denoted and to the mind.”).

20. 2 PEIRCE, *supra* note 19, at 5-6, 7; *accord* 1 PEIRCE, *supra* note 19, at 226 (“Icons are so completely substituted for their objects as hardly to be distinguished from them.”); 2 PEIRCE, *supra* note 19, at 307 (“An icon . . . possesses the quality signified.”).

21. 2 PEIRCE, *supra* note 19, at 5.

theatre ticket (signifying right of entrance), or a warning bell or buzzer (signifying danger).²²

Most signs combine iconic, indicational, and conventional meaning.²³ For example, the traditional Christmas nativity or crèche iconically replicates the New Testament accounts of Jesus's birth, because it is indexed to an event that Christians believe took place in literal history,²⁴ and it is conventionally associated in the West with the Christmas holiday celebrating the birth of the Christian Messiah and the related hope of salvation through him.²⁵

Peirce's semiotics of icon, index, and token suggest three inquiries necessary to ascertain the constitutionally relevant meaning of confessional symbols displayed by government: the sign's ordinary confessional meaning, based on its similarity to the idea or thing it signifies; the sign's alternate meaning, based on whether the specific context in which the sign is displayed might conceivably displace its confessional meaning with a secular alternative; and the alternate meaning's historical-cultural fit, based whether it is authentically present

22. 2 PEIRCE, *supra* note 19, at 5; accord 1 PEIRCE, *supra* note 19, at 225–26 (A token “is related to its object only in consequence of a mental association, and depends upon a habit. Such signs are . . . for the most part, conventional or arbitrary.”); 2 PEIRCE, *supra* note 19, at 9 (A symbol is “a conventional sign, or one depending upon habit . . .”).

23. See 2 PEIRCE, *supra* note 19, at 10.

24. See, e.g., Laycock, *supra* note 10, at 1213.

The nativity scene . . . necessarily depicts the first of the two miracles at the heart of Christianity. The nativity scene depicts the incarnation of God in human form—or as much Christian literature refers to it, the Incarnation with a capital I . . . [W]ithout the Incarnation, the nativity scene becomes either a meaningless arrangement of figures engaged in some unidentifiable activity (which no one believes), or it becomes a depiction of false worship—a depiction that would horrify its sponsors. If you think about it even a little bit seriously, the nativity scene can only represent the Christian belief in the Incarnation.

Id. See also *id.* at 1214 (“[I]t seems rather odd to describe a miraculous event as merely historical. But of course Christians who fully believe in the miracle believe that it actually happened and that it happened in historic time. So from a Christian perspective, the event is historical as well as miraculous.”).

25. See, e.g., Laycock, *supra* note 10, at 1212–14.

and genuinely recognized in the history and culture of the place where it is displayed.

A. Ordinary Confessional Meaning

“Ordinary meaning,” as we employ it, is rooted in the notion of “literal,” “semantic,” or “linguistic” meaning—that is, the meaning of a text based on the rules of the language in which it is written.²⁶ Consider the sentence, “This chair is broken.” By the rules of English spelling and grammar, the combination of letters and words signifies (i) an object on which people sit, generally having a seat, a back, and four legs, that is (ii) deficient—missing a leg, or otherwise unstable, or having a seat worn through or a missing back. This is the literal, semantic, or linguistic meaning of the sentence.

The “ordinary” meaning of a symbol is analogous to semantic meaning, constituting the object or idea that the symbol superficially signifies according to the communicative rules of the culture in which it is displayed, without attending to contextual details or deploying a very thick cultural knowledge. Indeed, nonlinguistic confessional symbols are the quintessential Peircean icon.²⁷ Every religious sign displayed by the government has an ordinary confessional meaning—a predominant iconic meaning rooted in its similarity to a religious belief that has cultural salience. To return to the Christian nativity, in the West it ordinarily signifies the birth of the son of God to save the world from death and sin. Strictly speaking, this meaning exceeds the purely semantic or iconic: it literally depicts a group of adults in ancient garb kneeling before a baby and a couple who appear to be its parents, in a stable filled with barnyard animals. Thus, one needs a cursory knowledge of Western culture—an awareness of the Gospel accounts of Jesus’s birth—to understand it as a common representation of that birth.

Similarly, a Latin cross merely imitates the most common form of execution among the ancient Romans, and crucifixes only depict a man nailed to such a cross. For anyone with a faint acquaintance with

26. See JONATHAN CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 110–11 (1982).

27. See “Sign and Symbols,” in 7 *ENCYCLOPEDIA OF PHILOSOPHY* 437, 441 (Paul Edwards ed., 1967).

Western culture, however, these signs are instantly recognizable as symbols of Christianity—the Roman cross on which Jesus was crucified—and Catholicism and Eastern Orthodoxy—Jesus nailed and dying on that very cross. We refer to these as the “ordinary” meanings of the cross and crucifix.²⁸

B. Alternate Secular Meaning

Peirce maintained that a correlative relationship exists between the indicational meaning of a sign and its object in the world.²⁹ Certainly the physical context in which a confessional sign is displayed will affect the meaning of the sign, sometimes to the point of apparently displacing its ordinary confessional meaning with another, secular meaning.

Consider, again, “This chair is broken.”³⁰ It could constitute a warning, if directed at someone about to sit on it: “This chair is broken,” *don’t sit on it!* But at a garage sale it could instead be an explanation: “This chair is broken,” *I don’t want to buy it.* Or an accusation, from someone who has fallen from it: “This chair is broken,” *you should have told me!* Although the linguistic meaning of the sentence remains the same in each example, its performative meaning changes according to the context in which it uttered.³¹ As these examples illustrate, the

28. See *infra* Parts II.A.1 & II.B.1.

29. See *supra* notes 19-23 and accompanying text.

30. The following performative examples are drawn from CULLER, *supra* note 26, at 113.

31. See ROLAND BARTHES, ELEMENTS OF SEMIOLOGY 38 (Annette Lavers & Colin Smith trans., 1967) (“[T]he union of a signifier and a signified” does not exhaust the semantic act, for the sign derives its value also from its surroundings.).

The relationship between an indicational sign and its object approximates the “performative effect” of spoken language. See J.L. AUSTIN, HOW TO DO THINGS WITH WORDS (2nd ed. 1975). Most utterances do not passively reflect or describe the world, but also actively “do” something in it. See *id.* at 94. For example, when uttered by a cleric or government official, “I now pronounce you husband and wife” effects a legally binding marriage. See *id.* at 5.

Although Austin restricted his analysis of performatives to the spoken word, others have applied it to signs. See, e.g., STÉPHANE BEAULAC, THE POWER OF LANGUAGE IN THE MAKING OF INTERNATIONAL LAW (2004); NELSON GOODMAN, LANGUAGES OF ART: AN APPROACH TO A THEORY OF SYMBOLS (1968); Hill, *Religious Symbolism*, *supra* note 10, at 545.

performative meaning of a sign depends on the context in which the semantic meaning of the sign is deployed.³²

The meaning of confessional signs likewise depends on the physical context in which they are displayed. Given the ordinary meaning of the Christian nativity as a sign of Jesus's miraculous birth, its placement on the lawn of a Protestant church identifies a place of Christian worship. But a nativity displayed by itself in the lobby of a courthouse might additionally imply Christian bias in the administration of justice.³³ And yet, the identical nativity in a commercial shopping district surrounded by secular signs and symbols may find its ordinary Christian significance diluted or entirely absent, displaced by another, secular meaning according to which the nativity is simply a marker of the winter holiday season celebrated by Christians, some nonChristians, and most unbelievers.³⁴

The significance of a religious sign displayed by the government is not necessarily its ordinary confessional meaning. That meaning is shaped, diluted, and sometimes wholly displaced by the physical context in which the sign is displayed.

C. Historical-Cultural Presence

Signs have no "inherent" meaning—that is, there is no natural or necessary relationship between a sign and the idea or object it signifies. As Ferdinand de Saussure put it, the "bond between the signifier and the signified is arbitrary."³⁵ "Arbitrary," however, does not mean "random"

32. Hill, *Ceremonial Deism*, *supra* note 12, at 36; see e.g., Brett Scharffs, *The Role of Judges in Determining the Meaning of Religious Symbols*, in THE LAUTSI PAPERS, *supra* note 6, at 35, 41 (arguing that flag-burning means something different when conducted by "Palestinian protesters in the West Bank" or "a large crowd on the Mall" than by "American Legionnaires or the Boy Scouts").

33. See, e.g., *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989); S. Ferrari, *supra* note 2, at 19.

34. See, e.g., *Lynch v. Donnelly*, 465 U.S. 68 (1984). The holding in *Lynch* has been widely criticized. See, e.g., Norman Dorsen & Charles Sims, *The Nativity Scene Case: An Error of Judgment*, 1985 U. ILL. L. REV. 837, 857 (1985); Frederick Mark Gedicks, *Lynch and the Lunacy of Secularized Religion*, 12 NEV. L.J. 640, 642–43 (2012); Laycock, *supra* note 10, at 1213–14.

35. FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 67 (Charles Bally & Albert Sechehaye eds., Wade Baskin trans., 1974).

or “unconstrained,” as if one might attribute any meaning whatever to a sign; to the contrary, the only way that language and other signs can function is through conventional rules governing meaning.³⁶ “Arbitrary” intends, rather, that the meaning of a sign is not rooted in the sign’s physical characteristics or is not otherwise latent within it, but is rather a function of its relations with other signs in the cultures that use them.³⁷

“Culture” consists of the “symbolic, imaginary system” that legitimate a society’s “political and social order.”³⁸ The signs and symbols that constitute a culture are generally used in regular and conventional ways.³⁹ Roland Barthes metaphorically described this regularity as “contractual,”⁴⁰ like the pseudo-historical “social contract.”⁴¹ Of course, the cultural contribution to a sign’s meaning is a legacy that precedes any particular use of the sign; the relation of sign and signifier is thus arbitrary in principle (*ex ante*) but not in practice (*ex post*).⁴²

Religion is freighted with culture and vice versa. Each has grown out of and informed the other. Religion, in other words, is “inculturated”—accessed by and through the history and culture of its adherents, at the same time that it is “of” that history and culture, “an integral part” of it.⁴³ Being Catholic, for example, has traditionally been

36. CULLER, *supra* note 26, at 114–15; TERRY EAGLETON, *LITERARY THEORY* 97 (1983); *see also* RONALD DWORKIN, *LAW’S EMPIRE* 31 (1986) (“We follow shared rules, they say, in using any word: these rules set out criteria that supply the word’s meaning.”).

37. *See* EAGLETON, *supra* note 36, at 97.

38. OLIVIER ROY, *HOLY IGNORANCE: WHEN RELIGION AND CULTURE PART WAYS* 26, 109 (2010); *see also* JAMES DAVISON HUNTER, *TO CHANGE THE WORLD: THE IRONY, TRAGEDY, AND POSSIBILITY OF CHRISTIANITY IN THE LATE MODERN WORLD* 32, 35 (2010) (“Culture is, first and foremost, a normative order by which we comprehend others, the larger world, and ourselves and through which we individually and collectively order our experience. . . . Particularly in *the cultural meaning imputed* to such things, culture can be understood as *symbolic capital*.”) (emphasis in original).

39. *See* Jack Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. MIA. L. REV. 1119, 1135–36 (1990).

40. *See* BARTHES, *supra* note 31, at 51.

41. “Sign and Symbols,” *supra* note 27, at 440.

42. BARTHES, *supra* note 31, at 51. *See also* MAURICE MERLEAU-PONTY, *SIGNS* 39–44 (Richard C. McCleary trans., 1964).

43. ROY, *supra* note 38, at 26; *see* Ravitch, *supra* note 10, at 1020–21.

an important part of being Irish—Catholicism informs what it means to be Irish—but at the same time Catholicism has been accessed through Irish history and culture—what it means to be a Irish has also informed what it means to be Catholic.

Given the intimacy of religion, history, and culture, it is possible—indeed, likely—that a society may so commonly and widely deploy a confessional sign that it seems to lose its confessional character. Such a sign might come to be used not only by adherents to the religion it originally and ordinarily signified, but also by members of other faiths and by unbelievers.⁴⁴ Christmas trees and crosses on national flags are examples of signs whose ordinary meaning has “crossed over” from the confessional to the secular.⁴⁵

II. CROSS AND CRUCIFIX

A. Salazar v. Buono

Buono began as a challenge to a 10-foot high white Latin cross displayed as a memorial to World War I veterans on federal park land in California’s Mojave Desert.⁴⁶ The lower federal courts initially held that display of the cross violated the Establishment Clause as an endorsement of Christianity,⁴⁷ a ruling the federal government declined to appeal to the USSCt.⁴⁸ To forestall permanent removal, Congress declared the cross a National Memorial, prohibited the use of federal funds to remove it, and transferred the few square yards on which it stood to the nongovernmental American Legion.⁴⁹ The original plaintiff then obtained an order that these congressional actions violated the

44. Cf. Zarrow, *supra* note 10, at 513 (“Neutrality among religions would be assured if a member of a minority religion would view the symbol displayed as secular or nondenominational.”).

45. See 2 GREENAWALT, *supra* note 10, at 69–70.

46. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1204–05 (C.D. Cal. 2002).

47. *Id.* at 1217.

48. *Salazar v. Buono*, 559 U.S. 700, 709 (2010).

49. *Buono v. Norton*, 364 F. Supp. 2d 1175, 1177, 1181–82 (C.D. Cal. 2005).

Establishment Clause.⁵⁰ This time, the government appealed to the USSCt, and a plurality found the lower courts insufficiently attentive to the possibility that the cross was a secular sign of military honor and sacrifice that did not endorse Christianity and thus whose display by government would be fully consistent with the Establishment Clause.⁵¹ It vacated the injunction and remanded the case for consideration of this possibility.⁵²

1. Ordinary Meaning of the Cross

In the West a Latin cross, without more, is overwhelmingly likely to be understood as the sign of Christianity and Christian belief, since for Christians the cross has been the virtually exclusive emblem of Jesus's resurrection and his related victory over death and sin for nearly two thousand years.⁵³

50. *Id.* at 1182.

51. 559 U.S. at 710–22.

52. *Id.* Justice Alito concurred on the Establishment Clause point, but thought remand unnecessary. 559 U.S. at 722–29 (Alito, J., concurring in part and concurring in the judgment). Justices Scalia and Thomas would have dismissed for plaintiff/appellee's lack of Article III standing, because the cross became private property after the transfer statute. 559 U.S. at 729–35 (Scalia, J., concurring).

Justices Stevens, Ginsburg, and Sotomayor would have affirmed that the transfer statute violated the Establishment Clause. 559 U.S. at 735–60 (Stevens, J., dissenting). Finally, Justice Breyer found the case controlled by general equitable principles and thus would have dismissed for lack of a substantial federal question. 559 U.S. at 760–65 (Breyer, J., dissenting).

Less than two weeks after *Buono* was decided the cross was stolen. See William M. Welch, *Vandals tear down cross that justices would not*, USA TODAY, May 14, 2010, available at http://usatoday30.usatoday.com/news/nation/2010-05-11-mojave-desert-cross_N.htm?csp=34. The lower courts have not yet taken any action on remand.

53. See 2 J.H.A. BOMBERGER, THE PROTESTANT THEOLOGICAL & ECCLESIASTICAL ENCYCLOPEDIA 37 (Lindsay & Blakiston, 1860); RICHARD HARRIES, THE PASSION IN ART 1 (2004); CYRIL E. POCKNEE, CROSS AND CRUCIFIX IN CHRISTIAN WORSHIP AND DEVOTION 33 (1962); RICHARD VILADESAU, THE BEAUTY OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE CATACOMBS TO THE EVE OF THE RENAISSANCE 7 (2006) [hereinafter VILADESAU, BEAUTY OF THE CROSS]; HARRIES, *supra*, at xi (“[I]n the earliest Christian art . . . the Cross and the Resurrection are seen in a unified manner as two aspects of one triumph.”).

The Latin cross depicts a horizontal line most of the way up a vertical line (“†”), and is believed to resemble the cross on which the Romans crucified Jesus.⁵⁴ Another rendering is the Greek cross composed of horizontal and vertical lines intersecting at their respective midpoints (“+”), used predominantly by the Eastern Orthodox Christian churches. Both versions are ubiquitous symbols of Christianity and Christian belief, appearing on altars, gravestones, clerical vestments, and military battle flags and banners (as in the Crusades); in sculpture, painting, cemeteries, and architecture (especially in connection with churches); and as personal jewelry and emblems of clerical office.⁵⁵

The cross is so closely linked to Christianity that its Christian meaning generally displaces all others.⁵⁶ The various courts in *Buono* were simply stating the semantically obvious in finding that the Latin cross is “certainly a Christian symbol,”⁵⁷ “the preeminent symbol of Christianity,”⁵⁸ “exclusively a Christian symbol,”⁵⁹ and “not a symbol of any other religion.”⁶⁰

2. Alternate Secular Meaning at Veterans Memorial

Given the ordinary Christian meaning of the cross, its display by government seems to align the government with Christianity. But this effect may be displaced by another effect, depending on the particular context in which the cross is displayed.

54. BOMBERGER, *supra* note 53, at 37; Orazio Marucchi, “Archaeology of the Cross and Crucifix,” *Catholic Encyclopedia*, NEW ADVENT (1909), available at <http://www.newadvent.org/cathen/04517a.htm>.

55. POCKNEE, *supra* note 53, at 69–77; Marucchi, *supra* note 54, at 13–14.

56. BOMBERGER, *supra* note 53, at 37 (“[The cross] must, like the atonement completed upon it, be regarded as the most peculiar property of Christianity.”); Lund, *supra* note 11, at 1391, (“[T]he cross’s religious meaning is undeniably primary. The cross is the central symbol of the central event of Christian theology . . .”).

57. 559 U.S. at 715.

58. *Buono v. Kempthorne*, 527 F.3d 758, 768–69 (9th Cir. 2008) (quoting *Buono v. Norton*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002)), *rev’d & remanded sub nom.* *Salazar v. Buono*, 559 U.S. 700 (2010).

59. *Id.*

60. *Id.*

For example, crosses are customarily found on signs identifying hospitals, pharmacies, and first-aid stations, a practice that remains common in Europe and the United States.⁶¹ The placement of the cross where healthcare services are available displaces its ordinary Christian meaning with a secular meaning—a place where one might receive medical care.⁶²

Similarly, crosses are sometimes a component of the corporate logos of entities associated with healthcare services, such as Blue Cross/Blue Shield, an international association of health insurance companies, and the International Red Cross. The distinctive branding effect of such logos differentiates their crosses from the Christian cross: both Blue Cross/Blue Shield and the International Red Cross use the Greek cross in addition to (obviously) coloring the cross in blue and red, respectively.⁶³ The Greek cross is also generally used in the United States and Europe as a traffic sign, displayed on a yellow or other distinctively colored background to mark an approaching intersection.

A secular use of the Latin cross has also emerged in popular culture. Actors, singers, members of rock bands, media figures, and ordinary people often wear Latin crosses as jewelry.⁶⁴ While many wear it as an emblem of personal Christian faith, others who wear it are often widely known to have rejected Christianity, or wear it in situations that apparently contradict Christian beliefs.⁶⁵

61. Italian pharmacies, for example, are commonly marked with a lighted green Greek cross, while Greek crosses on a blue background are displayed on U.S. interstate highways to signal that a hospital is near an exit.

62. One can argue, of course, that even this context bears the trace of less pluralist eras of Western history during which Christian clerics and missionaries were virtually the only trained providers of health care.

63. See BLUECROSS AND BLUESHIELD ASSOCIATION, <http://www.bcbs.com/>; INTERNATIONAL FEDERATION OF RED CROSS AND RED CRESCENT SOCIETIES, <http://www.ifrc.org/>. As its official name suggests, “red cross” was not secular enough for affiliates in Muslim societies.

64. See Scharffs, *supra* note 32, at 43–44.

65. Madonna’s use of cross imagery in the video rendition of her hit, “Like a Prayer,” for example, was deemed blasphemous by many Christians. See, e.g., *Vatican’s fury over Madonna “blasphemy,”* DAILY MAIL ONLINE, <http://www.dailymail.co.uk/tvshowbiz/article-398931/Vaticans-fury-Madonna-blasphemy.html>. Additionally, we are reliably informed by Professor Gedicks’s daughter that a recent contestant on a well-known United States dating reality show

In each of these situations, the ordinary Christian meaning of the cross is successfully displaced by other, secular meanings made clear by the precise physical context in which the cross is displayed.

The *Buono* plurality likewise portrayed the effect of displaying the cross at a veterans memorial as having displaced its ordinary Christian meaning, thus avoiding the unconstitutional Christian endorsement that would otherwise seem to follow from its display by the government. The Court maintained that the cross communicates a secular meaning of memory and honor, at least when displayed at a war memorial or veterans cemetery:

Although certainly a Christian symbol, the cross was not emplaced on Sunrise Rock to promote a Christian message. Placement of the cross on Government-owned land was not an attempt to set the *imprimatur* of the state on a particular creed. Rather, those who erected the cross intended simply to honor our Nation's fallen soldiers.⁶⁶

As confirmation of this meaning, the plurality pointed to the vast number of crosses marking graves of fallen American servicemen in battlefield cemeteries.⁶⁷

In short, the plurality concluded that the government's display of a cross at a veteran's memorial does *not* align the government with Christianity or coerce or encourage Christian belief, but simply honors and remembers the sacrifice of American soldiers fallen in defense of the United States.⁶⁸ This alternate, purportedly secular meaning of the cross raises at least two questions: (a) Is it *independent of* or *parasitic upon* its

rarely appeared without her Latin-cross pendant even though her behavior seemed rather consistently unChristian.

66. *Salazar v. Buono*, 559 U.S. 700, 715 (2010); *see also id.* at 717 (suggesting that the cross "has complex meaning beyond the expression of religious views"); *id.* at 721 (concluding that the cross "is a symbol often used to honor and respect those whose heroic acts, noble contributions, and patient strivings help secure an honored place in history for this Nation . . .").

67. *Id.* at 721.

68. *Id.* at 716.

ordinary Christian meaning? and (b) would its removal dishonor *all* veterans?

a. Separability

The plurality in *Buono* ignores whether its proposed secular meaning can be present in the absence of the Christian meaning—whether the cross can simply convey the secular message of memory and honor of wartime veterans without necessarily and simultaneously signifying Christianity and the Christian resurrection. If it cannot, then the alternate secular meaning is not independent of the ordinary Christian meaning, and thus is not really secular.

The supposed secular meaning of the cross actually depends on the cross's ordinary confessional meaning, and thus is not "secular" at all. As Professor Laycock has observed,

The cross honors Christian soldiers because it symbolizes the promise that they will rise from the dead and live forever. To say that the cross honors the Christian dead is not to identify a secular meaning of the cross; it is merely to identify a common application of the religious meaning of the cross. [T]he Christian cross has no meaning not derived from its primary religious meaning.⁶⁹

The plurality's proposed meaning is exposed as Christian in another way. Why choose the cross to honor all World War I veterans when any number of unambiguously secular symbols would just as powerfully commemorate their sacrifices? None of the Capitol Mall war memorials and monuments, for example, seems to contain a Christian or even a religious symbol.⁷⁰ Congress's choice of an ordinarily Christian

69. Laycock, *supra* note 10, at 1239. See also *id.* at 1240 ("[The cross's] power as a symbol, and the story it symbolizes, are entirely dependent on the divinity of Jesus. . . . Unthinking Christians may intend a cross to honor all the war dead, but that does not create any sensible theory by which the cross actually honors nonChristians.").

70. See *National Mall & Memorial Parks*, NATIONAL PARK SERVICE, <http://www.nps.gov/nama/index.htm>. Arlington National Cemetery, however,

symbol, rather than an unambiguously and independently secular one, suggests that the purpose and effect of displaying a Latin cross at the memorial were precisely to align the government with Christianity.⁷¹

Because the plurality's proposed secular meaning of the Sunrise Rock cross cannot be separated from its ordinary Christian meaning—indeed, is actually dependent upon it—it is not actually secular, and thus cannot save the cross from invalidation under the Establishment Clause.

b. Disrespect

Though it ignored the performative effect of the government's displaying the cross, the *Buono* plurality expressed deep concern about the potential performative effect of its removal, opining that this would dishonor and disrespect the fallen veterans whose sacrifice the cross supposedly memorialized.⁷² But dishonor entails the mistaken assumption that the cross honors all veterans, whereas it really honors

contains the "Argonne Cross," erected in the early 1920s to mark the section of the cemetery where World War I veterans were interred and named for the Argonne Unit of the American Women's Legion. See "Argonne Cross (WWI)," ARLINGTON NATIONAL CEMETERY <http://www.arlingtoncemetery.mil/Explore-the-Cemetery/Monuments-and-Memorials/Argonne-Cross>.

71. Bartrum, *supra* note 11, at 1661 ("[The plurality] fails to explain why—if the cross's religious meaning is not central to its symbolism—the easiest solution would not be to replace it with a nonreligious memorial. . . . [I]t seems disingenuous . . . to deny that the symbol's deep religious significance adds something essential to the mix."); see *Bd. of Educ. of Kiryas Joel Sch. Dist. v. Grumet*, 512 U.S. 689, 707–08 (1994) (invalidating special public school district for disabled school children drawn to coincide with boundaries of Ultra-Orthodox Jewish community because, *inter alia*, less religious-conscious means of accommodating community's beliefs were available); *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 618 (1989) (Blackmun, J., concurring) ("Where the government's secular message can be conveyed by two symbols, only one of which carries religious meaning, an observer reasonably might infer from the fact that the government has chosen to use the religious symbol that the government means to promote religious faith."), *abrogated by Town of Greece v. Galloway*, 572 U.S. ___, 134 S. Ct. 1811 (2014); *Sch. Dist. of Abington Twp. v. Schmepp*, 374 U.S. 203, 294–95 (1963) (Brennan, J., concurring) ("[W]hat our decisions under the Establishment Clause have forbidden, are those involvements of religions with secular institutions which . . . use essentially religious means to serve governmental ends, where secular means would suffice.").

72. 559 U.S. at 716.

only Christians. Of course, neither Christian veterans nor those of any other religious group are entitled to the military's exclusive adoption of the sign of their faith, and thus neither Christians nor any other group can reasonably claim disrespect when such a sign is removed.⁷³

3. The Latin Cross in American History and Culture

The *Buono* plurality maintains that whatever may have been its ordinary meaning when the cross was first erected, by the time Congress enacted its memorial designation that meaning had evolved into a secular commemoration of military sacrifice.⁷⁴

Culture is not static, and neither are its symbols. It is certainly conceivable that the meaning of an unambiguously confessional symbol might evolve into something predominantly secular, like a Christmas tree. Originally of pagan origin and signifying renewal, Christmas trees were adopted by early Christians as emblems of the hope of everlasting life associated with Jesus's birth. Only recently have they reverted to something resembling their pagan origins—largely secular signs of the holiday season, their pervasive, inoffensive secularity confirmed by ubiquitous and uncontroversial commercial exploitation.⁷⁵

The Latin cross has not undergone this sort of semiotic evolution, even when displayed at a veterans' memorial or cemetery. As Justice Alito conceded, the "thousands of small crosses" marking battlefield graves of fallen soldiers are interspersed with hundreds of

73. Cf. *Allegheny*, 492 U.S. at 601 ("[P]rohibiting the display of a crèche in the courthouse deprives Christians of the satisfaction of seeing the government adopt their religious message as their own, but this kind of government affiliation with particular religious messages is precisely what the Establishment Clause prohibits."); *id.* at 612 ("[S]ome Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire . . .").

74. 559 U.S. at 716 (finding that over the decades of its existence the cross and its commemorative purpose "ha[ve] become entwined in the public consciousness," making it "reasonable to interpret the congressional designation as giving recognition to the historical meaning that the cross had attained") (alteration in original).

75. See generally *Allegheny*, 492 U.S. at 616; *Christmas Tree*, in *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/EBchecked/topic/115737/Christmas-tree>.

Stars of David marking the battlefield graves of fallen *Jewish* soldiers.⁷⁶ Indeed, the U.S. military now allows a choice of grave markers from among scores of Christian, nonChristian, and nonreligious symbols.⁷⁷ If the cross were really a secular symbol of memory and sacrifice, if it really did “nothing more” than honor fallen veterans, it alone should suffice to mark and honor the graves of all fallen servicemen.⁷⁸

It is not hard to imagine that Jewish veterans or their families might feel troubled rather than honored by a Christian cross. In fact, one of the original *Buono* plaintiffs, a decorated Jewish war veteran, alleged that as “a sectarian Christian symbol,” the cross “is not meaningful to him.”⁷⁹ It is equally understandable that unbelievers and most other believers outside of the American Christian mainstream might not perceive a meaning in the cross that includes them.⁸⁰ Christians were a

76. 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment) (“In American military cemeteries overseas, the graves of soldiers who perished in [the First World War] were marked with either a white cross or a white Star of David. More than 3,500 Jewish soldiers gave their lives for the United States in World War I”)

77. See AVAILABLE EMBLEMS OF BELIEF FOR PLACEMENT ON GOVERNMENT HEADSTONES AND MARKERS, <http://www.cem.va.gov/ce/docs/emblems.pdf>. Some of these markers are also illustrated in LESLIE GRIFFIN, LAW AND RELIGION 422 (2d ed. 2010).

78. Cf. *Am. Atheists, Inc. v. Davenport*, 637 F.3d 1095, 1112 & n.2 (10th Cir. 2010) (noting that the state would not have permitted the family of a fallen officer to choose a symbol other than a Latin cross to memorialize a trooper, presumably because the state maintained in litigation that the cross is a purely secular symbol of honor and memory), *cert. denied*, *Utah Highway Patrol Ass’n v. Am. Atheists, Inc.*, 132 S. Ct. 12 (2011).

79. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1209 (C.D. Cal. 2002). This plaintiff dropped out of the litigation because of questions about his Article III standing, but the issue resurfaced at oral argument before the USSCt.

Justice Alito noted that it would have been appropriate for Congress to have added the Star of David and other religious symbols to the monument. But he lamely excused its failure to do so by speculating that this would not have satisfied the cross’s opponents. 559 U.S. at 726 (Alito, J., concurring in part and concurring in the judgment). Of course, whether the addition of other confessional symbols would have satisfied the plaintiffs is beside the point; the ordinary Christian meaning of the cross does not vanish because a plaintiff acts unreasonably in settlement negotiations.

80. See VILADESAU, BEAUTY OF THE CROSS, *supra* note 53, at 8 (“As a symbol of salvation, the cross has not lost its offensive character to those outside the

key element in two of the sustained religious persecutions in U.S. history, those of Mormons during the late 19th century⁸¹ and of Jehovah's Witnesses during the early 20th century.⁸² Both faiths have forcefully rejected the cross as a confessional symbol.⁸³ Association of the cross with Christian persecution and discrimination is embedded in Jewish and (especially) Muslim culture;⁸⁴ they, too, have rejected it as a confessional symbol.⁸⁵ Unbelievers, meanwhile, remain politically and culturally marginalized in the U.S., and of course have no use for the cross.⁸⁶

Christian tradition . . ." such as South Asians, Sunni Muslims, Jews, and unbelievers).

81. *See, e.g.*, SARAH BARRINGER GORDON, *THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH-CENTURY AMERICA* 75–83, 228–33 (2002).

82. *See, e.g.*, *THE PERSECUTION OF JEHOVAH'S WITNESSES: THE RECORD OF VIOLENCE AGAINST A RELIGIOUS ORGANIZATION UNPARALLELED IN AMERICA SINCE THE ATTACKS ON THE MORMONS* (1941).

83. For Mormons, *see* MICHAEL G. REED, *BANISHING THE CROSS: THE EMERGENCE OF A MORMON TABOO* 33–85 *passim*, 113–20 (2012); Gordon B. Hinckley, *The Symbol of Our Faith*, *THE ENSIGN* (Apr. 2005), at 3 ("[F]or us, the cross is the symbol of the dying Christ, while our message is a declaration of the Living Christ."). In the 1960s, the LDS church obtained approval of a distinctively Mormon military grave marker so that the burial sites of LDS servicemen and women would not be marked by a cross. REED, *supra*, at 121–22.

For Jehovah's Witnesses, *see Why True Christians Do Not Use the Cross in Worship*, JEHOVAH'S WITNESSES, <http://www.jw.org/en/publications/books/bible-teach/why-true-christians-do-not-use-the-cross-in-worship/>; Leolaia, *Jehovah's Witnesses and the Cross*, JEHOVAH'S WITNESS DISCUSSION FORUM (1990), <http://www.aggelia.be/jwcross.pdf>. Jehovah's Witnesses also have their own distinctive military grave marker that lacks a cross.

84. *See, e.g.*, T. Jeremy Gunn, *Religious Symbols in Public Schools: The Islamic Headscarf and the European Court of Human Rights Decision in Sahin v. Turkey*, in *ISLAM, EUROPE, AND EMERGING LEGAL ISSUES* 111, 112 (W. Cole Durham, Jr., et. al. eds., 2012); *see also* KAREN ARMSTRONG, *HOLY WAR: THE CRUSADES AND THEIR IMPACT ON TODAY'S WORLD* xvii, 2d ed. 2001); *cf.* *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012) (striking down state constitutional amendment approved with strong conservative Christian support that singled out Sharia law for special disabilities).

85. *E.g.*, WILLIAM K. EMERSON, *ENCYCLOPEDIA OF UNITED STATES ARMY INSIGNIA AND UNIFORMS* 268 (recounting how during World War II, Army-commissioned Jewish chaplains insisted on a different insignia than the cross that had theretofore identified all Army chaplains, because they considered the cross offensive when worn by rabbis); REED, *supra* note 83, at 89, 91–92 (recounting opposition of Salt Lake City rabbis to cross memorial proposed in the early twentieth

The ordinary meaning of the Latin cross might conceivably have evolved over the centuries, from an exclusively Christian symbol of the resurrection to a largely secular sign of something else, like the Christmas tree or the crosses used to mark hospitals.⁸⁷ If this were true, however, one would expect to find confirming cultural evidence—that is, uses of the cross by nonChristians and unbelievers personally, as well as collectively by institutions which nonChristians and unbelievers control or in which they have substantial influence, to depict memory and honor for military sacrifice, just as many unbelievers and some nonChristians put up Christmas trees every December.

There is no cultural evidence, however, that the Latin cross has been embraced by American unbelievers or nonChristian believers as a religiously neutral signifier of military honor and sacrifice or, indeed, of anything other than Christianity.⁸⁸ The record in *Buono* itself confirms this, showing that the cross at the World War I memorial was a regular site for Easter sunrise services, but not for celebrations by nonChristians or unbelievers or for secular ceremonies on Veterans Day, Memorial Day, or other secular holidays with military significance.⁸⁹ As plaintiff's counsel pointed out at oral argument, there are no crosses in Jewish cemeteries.⁹⁰ Congressional designation of the cross as a veteran's

century). See *supra* note 79 and accompanying text (discussing opposition of Jewish war veteran to Sunrise Cross).

86. See, e.g., Corbin, *supra* note 10, at 357–75; Jennifer Gresock, Note, *No Freedom from Religion: The Marginalization of Atheists in American Society, Politics, and Law*, 1 U. MD. L.J. RACE RELIG. GENDER & CLASS 569 (2001).

87. See *supra* notes 59–61 and accompanying text; *supra* note 74 and accompanying and preceding text.

88. For example, every authorized military marker for a mainstream Christian faith includes a cross, while of the 29 markers authorized for unbelievers, nonChristians, or Christians outside the orthodox mainstream, only one includes a cross. See AVAILABLE EMBLEMS, *supra* note 77; GRIFFIN, *supra* note 77, at 422. See also Lupu & Tuttle, *supra* note 12, at 976 (arguing that permanent display of cross on altar or pulpit of university chapel open to use by all faiths “cannot readily be harmonized with nonChristian use of the space”).

89. See *Salazar v. Bueno*, 559 U.S. 700, 753 n.9 (2010) (Stevens, J., dissenting) (analyzing and summarizing record to show incorrectness of plurality's unsupported assertion that secular memorial ceremonies were regularly held at the cross).

90. Counsel, who is apparently Jewish, made this statement in response to Justice Scalia's expression of outrage that one might think the cross did not honor

memorial did not make the cross secular, it made the memorial Christian.⁹¹

B. Lautsi & Others v. Italy

Lautsi & Others began with two Italian parents who asked that crucifixes displayed in classrooms of the middle school where their two sons attended be removed.⁹² School and regional administrators not only rejected their request, but also issued a circular to other public school principals expressly recommending the crucifix's classroom display.⁹³ The boys' mother then filed suit in the *Tribunale Administrative Regionale Veneto*, the Italian administrative court in the Veneto Region having original jurisdiction, asking that the administrators' decision be annulled as a violation of the fundamental Italian principle of *laicità*.⁹⁴

Difficult to translate—it literally means “laic-ness” or “laicity”—Italian *laicità* is usually defined as “inclusive” state religious neutrality or government “equidistance” with respect to all forms of belief and unbelief.⁹⁵ It is distinct from “secularism,” which Italians associate with French *laïcité* and (somewhat inaccurately) American

Jewish veterans: “The cross is the most common symbol of the resting place of Christians. I have been in Jewish cemeteries. There is never a cross on a tombstone of a Jew.” Tr. Oral Arg., at 38–39, *Salazar v. Buono*, 559 U.S. 700 (2010) (No. 08-472).

91. See 559 U.S. at 754 (Stevens, J., dissenting).

92. TAR Veneto prima Sez. I, 13 novembre 2003, Sent. N. 56/04, Ric. No. 2007/02, at 2.

93. *Id.* at 5 ¶ 2.3.1.

94. *Id.* at 2–3.

95. See Marco Ventura, *Italy*, in INTERNATIONAL ENCYCLOPAEDIA OF LAWS: RELIGION 17, ¶ 74 at 50 (Rik Torfs ed., 2013) (defining *laicità* as a “[s]upreme principle of Italian constitutional law . . . implying the equidistance and neutrality of the State towards all religious denominations,” and derivable from constitutional principles of “equality, non-discrimination on grounds of religion, and independence of the State from the Catholic Church”); TAR Veneto prima Sez. III, 17 marzo 2005, Sent. N. 1110/2005, Ric. No. 2007/02, at 23 ¶ 7.1 (defining *laicità* as the “a-confessionality” of the state) (authors’ translation); Corte Cost., 14 dicembre 1989, Sent. N. 203, ¶ 4 (“The principle of *laicità* . . . implies not an indifference of the State with respect to religions but a guarantee of the State for the safeguarding of religious liberty in a regime of confessional and cultural pluralism.”) (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 9, 10.

church-state jurisprudence.⁹⁶ The term does not appear in the Italian Constitution; it emerged in the wake of the 1984 Villa Madam Accords between Italy and the Holy See, which transformed Italy from a confessional to a secular state but expressly recognized Catholicism as part of Italy's "historical heritage."⁹⁷ *Laicità* is now well-established as a fundamental (albeit nontextual) Italian constitutional norm limiting government action.⁹⁸

Specifically at issue in *Lautsi* were two Fascist-era royal decrees previously held valid and enforceable in contemporary republican Italy.⁹⁹ One, issued in 1924, requires that every middle school "have the national flag" and every classroom, "the symbol of the Crucifix."¹⁰⁰ The other, issued in 1928, lists required furnishings for various public school classrooms, including a crucifix for each elementary school classroom.¹⁰¹

Finding that the plaintiff's case for the constitutional invalidity of the decrees was "not manifestly unfounded," the *Tribunale* referred the case in accordance with Italian procedure to the *Corte Costituzionale*, the appellate court in Italy charged with ruling on the constitutionality of statutes and laws.¹⁰² The *Corte*, however, held that it lacked jurisdiction to determine the constitutionality of administrative (as opposed to legislative) actions, and remanded the case back to the *Tribunale*.¹⁰³

On remand, the *Tribunale* upheld classroom crucifix displays, finding that the practice conformed to *laicità* because the crucifix merely

96. See LORENZO ZUCCA, A SECULAR EUROPE 101 (2012) ("[S]ecularism must be sharply separated from neutrality. Neutrality is inclusive, [whereas] secularism is exclusive. The Italian government is firmly committed to neutrality, but not to secularism. In fact, neutrality means that the state should refrain from promoting secularism which amounts to a form of proselytism . . .") (alteration in original).

97. See Pin, *supra* note 11, at 120–27. Professor Pin argues that initially *laicità* was characterized by a "strong connection and . . . collaboration" between church and state which supported state display of Catholic symbols, and only later evolved into a mandate of "some" church/state separation. See *id.* at 134–35.

98. Corte Cost., 14 dicembre 1989, Sent. N. 203, ¶¶ 4 & 9.

99. See Cons. Stato Sez. II, 27 aprile 1988, Sent. N. 63/88.

100. R.D., 30 aprile 1924, n. 965/24 (It.), Art. 118, cap. XII (authors' translation) [hereinafter 1924 Decree].

101. R.D., 26 aprile 1928, n. 1297 (It.), Art. 119, tab. C [hereinafter 1928 Decree].

102. TAR Veneto prima Sez. I, 13 novembre 2003, Sent. N. 56/04, Ric. No. 2007/02, at 13–15 ¶¶ 5.3 & 6 (authors' translation).

103. Corte Cost., 13 dicembre 2004, Ordinanza n. 389.

signifies (i) the Christian origins of secular values recited in the Italian Constitution,¹⁰⁴ and (ii) the Catholic roots of Italian history and culture.¹⁰⁵ The *Consiglio di Stato* affirmed, relying only on the *Tribunale*'s first rationale.¹⁰⁶ On plaintiff's appeal to the ECtHR, the court's seven-judge Second Section unanimously reversed, finding that the predominantly Catholic meaning of the crucifix infringed student and parental rights to freedom from Catholicism and upset religious pluralism in the classroom by suggesting that "the State takes the side of Catholicism"¹⁰⁷ in violation of the European Convention of Human Rights.¹⁰⁸ The Second Section decision, in turn, was reversed by a seventeen-judge Grand Chamber of the ECtHR,¹⁰⁹ which found that perpetuating a tradition of displaying crucifixes in classrooms as "passive" symbols of culture and religious freedom was within the "margin of appreciation" granted to Convention signatories to adapt its principles to their particular national circumstances.¹¹⁰

1. The Ordinary Meaning of the Crucifix

In contrast to the unadorned Latin cross, the crucifix depicts Jesus nailed to the cross. The crucifix emerged as a Christian symbol during the fourth or early fifth century.¹¹¹ Early crucifixes generally showed a fully-clothed and triumphal Jesus "alive and reigning" on the

104. TAR Veneto prima Sez. III, 17 marzo 2005, Sent. N. 1110/2005, Ric. No. 2007/02, at 31-35 ¶¶ 11.1-11.9; *Lautsi – English Translations*, *supra* note 5, at 12-14.

105. *E.g.*, TAR Veneto prima Sez. III, 17 marzo 2005, Sent. N. 1110/2005, Ric. No. 2007/02, at 28-29, ¶¶ 8.1-8.3; *Lautsi – English Translations*, *supra* note 5, at 11.

106. Cons. Stato, 13 gennaio 2006, Decisione N. 556/06, N. 7314/2005 Reg. Dec. 16; *Lautsi – English Translations*, *supra* note 5, at 22-23.

107. *Lautsi*, at 12-13 ¶¶ 51-55.

108. *See* European Convention, *supra* note 2, art. 9; Protocol No. 1, *supra* note 2, art. 2.

109. "Grand Chamber" review of a Chamber decision of the ECtHR is analogous to en banc review of a panel decision in the U.S. Courts of Appeals. For a description of ECtHR procedures relating to section panel and grand chamber proceedings, see Witte & Arold, *supra* note 11, at 15-16.

110. *Lautsi & Others*, at 27-31 ¶¶ 63-77.

111. BOMBERGER, *supra* note 53, at 38; POCKNEE, *supra* note 53, at 38-39; "Archaeology of the Cross and Crucifix," *supra* note 54, at 17-19.

cross.¹¹² It was not until the early Middle Ages that Christ was shown dead on the cross,¹¹³ and not until the late Middle Ages did crucifixes generally depict a realistically crucified Jesus—almost naked and bloodily nailed to the cross, with bowed head and eyes closed in mortal suffering and death.¹¹⁴

The crucifix is closely associated with the Roman Catholic Church, though it is also used by Eastern Orthodox Christianity. Reformation Protestants (especially Calvinists) rejected use of the crucifix as an aspect of the Catholic veneration of icons, but its use persisted among Anglicans, Lutherans, and Methodists into the seventeenth century.¹¹⁵ Since the nineteenth century, its use has been almost entirely confined to Catholicism and Eastern Orthodoxy, and it is widely understood as the quintessential Roman Catholic sign.¹¹⁶

112. BOMBERGER, *supra* note 53, at 39; HARRIES, *supra* note 53, at 10–11, 18–19; *see* VILADESAU, BEAUTY OF THE CROSS, *supra* note 55, at 62–69.

113. HARRIES, *supra* note 53, at 28–30 (mid-seventh century); VILADESAU, BEAUTY OF THE CROSS, *supra* note 53, at 48 (mid-ninth century).

114. BOMBERGER, *supra* note 53, at 39; HARRIES, *supra* note 53, at 48, 65–66; POCKNEE, *supra* note 53, at 48, 63, 65–66; “Archaeology of the Cross and Crucifix,” *supra* note 54, at 20–21; VILADESAU, BEAUTY OF THE CROSS, *supra* note 53, at 155–58; *see also* RICHARD VILADESAU, THE TRIUMPH OF THE CROSS: THE PASSION OF CHRIST IN THEOLOGY AND THE ARTS, FROM THE RENAISSANCE TO THE COUNTER-REFORMATION 12–13 (2008) [hereinafter VILADESAU, TRIUMPH OF THE CROSS] (discussing Fra Angelico’s “St. Dominic in Adoration before the Crucifix” (ca. 1440–45)).

115. BOMBERGER, *supra* note 53, at 38; POCKNEE, *supra* note 53, at 76–77, VILADESAU, TRIUMPH OF THE CROSS, *supra* note 114, at 128–33.

116. *See, e.g.,* J. HOPPENOT, LE CRUCIFIX 6 (De Brouwer, 5th ed. 1905).

The crucifix is the epitome of Catholic dogma: the person of him who suffers on it, the only *Son* of God the *Father*, conceived in Mary’s womb by power of the *Holy Spirit*, reminds us of the two great mysteries of the Trinity and the Incarnation. . . . The crucifix is the memorial to Christian morality. Pagan morality said, “Let us eat and drink, for tomorrow we die.” Against these facile principles, the cross tells you, “You are of Christ, crucify your flesh with its vices and sins.

Id. (emphasis in original) (authors’ translation); *see also* Gunn, *supra* note 79, at 112 (“The Catholic Church . . . places the crucifix at the focal point of its churches. The sacred Mass, which employs crucifixes as part of the ceremony, commemorates the crucifixion of Christ.”).

The ECtHR Grand Chamber barely admitted the ordinary Catholic meaning of the crucifix. The Court laconically described the crucifix as “above all a religious symbol” which “undoubtedly refers to Christianity.”¹¹⁷ The *Consiglio di Stato* did little better, conceding that “the crucifix is properly and exclusively a ‘religious symbol,’ insofar as it seeks to encourage a reverent adherence towards the founder of the Christian religion,” but only in a “place of worship,” foreshadowing the ECtHR’s questionable use of performative effect to empty the crucifix of any confessional meaning at all.¹¹⁸ The *Tribunale* evaded the problem entirely by flatly equating the Catholic crucifix with the Christian cross.¹¹⁹

One must consult lower court decisions that were vacated or overruled for a detailed account of the crucifix’s ordinary Catholic meaning. The *Tribunale* that first referred the action to the *Corte Costituzionale* had no trouble conceding that the crucifix is obviously and ordinarily understood throughout Italy as the quintessential sign of Catholicism and Catholic belief, observing that its classroom display “honors an *unambiguous* confessional meaning, perceived as such by the largest part of those associated with the school”¹²⁰ Likewise, the Second Section of the ECtHR found that the crucifix’s Catholic meaning predominated over all others,¹²¹ and expressed its skepticism that “display in state-school classrooms of a symbol that it is reasonable to associate with Catholicism (the majority religion of Italy)” would serve the religious educational pluralism and liberal-democratic values guaranteed by the Convention.¹²²

There is little doubt that in Italy the crucifix, without more, is ordinarily understood as the sign of the Catholic Church and Catholic belief.

117. *Lautsi & Others*, at 27–28 ¶ 66.

118. Cons. Stato, 13 gennaio 2006, Decisione N. 556/06, N. 7314/2005 Reg. Dec. 15 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 22; see *infra* Part II.B.2.

119. TAR Veneto prima Sez. III, 17 marzo 2005, Sent. N. 1110/2005, Ric. N. 2007./02, 13–14 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 4–5.

120. TAR Veneto prima Sez. I, 13 novembre 2003, Sent. N. 56/04, Ric. No. 2007/02 12 (emphasis added) (authors’ translation).

121. *Lautsi*, at 12 ¶¶ 51, 53 (citation omitted).

122. *Id.* at 13 ¶ 56.

2. Alternate Secular Meaning in Public School Classroom

Given the Catholic ordinary meaning of the crucifix, its display by government seems to align it with Roman Catholicism. As with the Latin cross, this expected effect might be displaced by another effect that renders the crucifix secular or otherwise appropriate when placed in the requisite physical context.

The controlling opinions in *Lautsi* present a semiotic regression on this point, in which a detailed account of the crucifix's purportedly secular performative effect is successively diluted until it drops out of the case entirely. The *Tribunale* gave a rich (if controversial) account of the crucifix's purported secular effects, concluding that it signified the Christian foundation of secular Italian culture and universal human rights.¹²³ On appeal, the *Consiglio* agreed in part, holding that classroom crucifixes communicated the Catholic origins of secular human liberty.¹²⁴ Finally, the Grand Chamber found the crucifix's ordinary Catholic meaning wholly displaced without identifying any alternate secular meaning, holding that the crucifix is an "essentially passive" symbol that does not religiously influence school children in the absence of affirmative efforts by the school to coerce Catholic practice or belief.¹²⁵

a. Secular Liberty & Secular History

The *Tribunale* began by observing that "in the public schools in which children are necessarily introduced to the values of liberty, democracy, and the *laicità* of the State, it is not legal to impose any type of religious belief . . .,"¹²⁶ and emphasizing the powerful obligation of religious impartiality that *laicità* imposes on the State.¹²⁷

Laicità's constitutional mandates of state theological equidistance and nonconfessionalism imposed on the *Tribunale* the difficult task of delivering a plausible account of the crucifix as a secular

123. See *infra* Part II.B.2.a.

124. See *infra* Part II.B.2.b.

125. See *infra* Part II.B.2.c.

126. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 24 ¶ 7.1 (authors' translation); *Lautsi – English Translations*, *supra* note 5, at 9.

127. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 24–25, 26 ¶¶ 7.2, 7.4; *Lautsi – English Translations*, *supra* note 5, at 9–10.

rather than (merely) Catholic symbol. The *Tribunale* began by emphasizing that the crucifix is “also an historical-cultural symbol, and thus endowed with a value of identity in reference to [the Italian] people.”¹²⁸ But neither historical analysis nor even the constitutional value of *laicità*, observed the *Tribunale*, can change an Italian past saturated with Christianity.¹²⁹ An understanding of the crucifix as a mere symbol of Italian history and culture, it concluded, would be sufficient to dismiss the plaintiff’s action, because a sign that “summarizes relevant aspects of our society, of our humanistic culture as well as our popular conscience, would not damage in any way the *laicità* of the State or the objectives of public school instruction and thus the sphere of liberty of every citizen.”¹³⁰

The problem, admitted the *Tribunale*, is that the crucifix cannot plausibly be viewed as merely a historical-cultural symbol, but must also satisfy *laicità* as the confessional symbol it is ordinarily understood to be.¹³¹ Having candidly confessed the semiotic difficulty of separating the crucifix’s ordinary confessional from its purportedly secular meaning—something the *Buono* plurality failed to do—the *Tribunale* then (rather less candidly) pulled a rhetorical “bait and switch.” Having to this point discussed the meaning of the “crucifix,” the court inexplicably changed to a discussion of the meaning of the “cross,” as if one were indistinct from the other.¹³²

128. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 28 ¶ 8.1 (authors’ translation) (emphasis in original); *Lautsi – English Translations*, *supra* note 5, at 11.

129. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 28 ¶ 8.1; *Lautsi – English Translations*, *supra* note 5, at 11.

130. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 29 ¶ 8.3 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 11.

131. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 29–30 ¶ 9.1; *Lautsi – English Translations*, *supra* note 5, at 12.

132. The court relied on the fact that individual schools had sometimes displayed unadorned crosses in response to the Fascist-era decrees requiring display of the crucifix. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 13–14 ¶¶ 4.1–4.2; *Lautsi – English Translations*, *supra* note 5, at 4–5. As another Fascist-era decree made clear, however, the substitution of cross for crucifix was not a general dispensation, but a specific concession to the Waldensians (*Valdesi*), a small pre-Reformation Christian sect which rejected the crucifix and in the 1920s was almost entirely concentrated in remote areas of Sicily and the French-Italian Alps. See TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at ¶ 4.2

The switch to cross from crucifix made it easier to conform its use by government with *laicità*. The unadorned cross is “understood as the symbol of Christianity, not simply that of Catholicism, and thus also captures beyond Catholicism itself the values of the other Christian confessions present” in Italy,¹³³ a claim that could not have been made for the crucifix. But even granting the ecumenical character of the *cross*, it does not reach non-Christian confessions, is not ordinarily secular, and is not relevant to any secular meaning of the *crucifix*.

Having equated crucifix with cross, the *Tribunale* initiated a detailed explication of Christianity as the root of human virtue and, in particular, those virtues grounding universal human rights.¹³⁴ The words “crucifix” and “cross” both appear in this lengthy passage, but the court uses “cross” whenever it emphasizes the purportedly open and inclusive character of Christianity.¹³⁵ The point was to establish that the cross and the crucifix symbolize Christian charity and care for the other, values that also ground the post-confessional Italian republic:

Christianity, . . . with its strong accent on the precept of love for one’s neighbor and even more with the explicit predominance of charity in one’s faith, contains in essence those ideas of tolerance, equality, and liberty that are at the base of the modern secular state, and the Italian state in particular.

Looking beyond the superficial, one discerns a line of thought that gathers in itself the Christian revolution of two thousand years ago, the affirmation in Europe of *habeas corpus*, the very cardinal elements of Enlightenment (even though historically posed in lively contrast with religion),

(citing Circolare n. 8823 (Ministero Pubbl. Instru. 1923)); *Lautsi – English Translations*, *supra* note 5, at 5.

133. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 30 ¶ 9.2 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 12.

134. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 31–42 ¶¶ 11.1–15.2; *Lautsi – English Translations*, *supra* note 5, at 12–17.

135. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 31–42 ¶¶ 11.1–15.2; *Lautsi – English Translations*, *supra* note 5, at 12–17.

that is, the liberty and dignity of man, the declaration of the rights of man, and ultimately the very *laicità* of the modern state; all of these historical phenomena are in a significant way—though certainly not exclusively—in the Christian conception of the world.¹³⁶

The court even went so far as to positively associate Christianity with the motto of the profoundly anti-clerical French revolution.¹³⁷

From this premise, the Court concludes that *laicità* is so well established as a constitutional principle that there is little danger in the court's entertaining a "new and contemporary" secular meaning for the *cross*, notwithstanding its ordinary Christian one.¹³⁸ It then takes this new secular meaning of the Christian *cross* and imputes it to the Catholic *crucifix*, as both

the symbol of a particular historical and cultural national identity" and "the expression of secular principles of the community . . . the *crucifix* can be legitimately placed in the classrooms of public schools, in that it not only doesn't clash with but indeed affirms and confirms the principle of the *laicità* of the republican State."¹³⁹

136. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 31–32 ¶ 11.1 (authors' translation); *Lautsi – English Translations*, *supra* note 5, at 12–13.

137. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 32 ¶ 11.2 (“[*L*]iberté, égalité, fraternité,” constitutes a motto easily shared by a Christian, albeit with obvious emphasis on the third term.”) (author's translation); *Lautsi – English Translations*, *supra* note 5, at 13.

138. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 41–42 ¶ 15.2 (authors' translation); *Lautsi – English Translations*, *supra* note 5, at 17.

139. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 42 ¶ 16.2 (authors' translation) (emphasis added); *Lautsi – English Translations*, *supra* note 5, at 18.

Thus, the *Tribunale* concluded: “The crucifix is the symbol of our history and our culture and, as a consequence, of our identity . . . and also of the *laicità* of the State.”¹⁴⁰

The *Tribunale* decision is an unsubtle sleight-of-hand. It dubiously asserted an identity of meaning between the Christian cross and the Catholic crucifix. It then identified Christian values symbolized by the cross, and asserted (again dubiously) that these also form the exclusive basis of Italian constitutional and fundamental secular human rights.¹⁴¹ Concluding that government display of the *cross* does not violate *laicità*, it simply substituted Catholic crucifix for Christian cross to hold that display of the crucifix conforms to *laicità* as well, notwithstanding its ordinary Catholic meaning.

b. Secular Liberty

On appeal from the *Tribunale*, the *Consiglio di Stato* reasoned that while the crucifix was undoubtedly a religious symbol when displayed in a place of worship, it might also communicate secular values when displayed in a nonreligious venue like a public school:

[F]or believers and nonbelievers the [crucifix’s] display will be justified and will assume a nondiscriminatory meaning under its religious profile, if it is able to represent and to precisely recall in an immediately perceptible and intuitive form . . . relevant civic values, and to call particular attention to those values that suggest and inspire our constitutional order, the base of our shared civil life. In this sense the crucifix can develop, even in

140. TAR Veneto, sez. terza, 22 marzo 2005, n. 1110, Foro it. 2005, III, at 38 ¶ 12.4 (authors’ translation) (emphasis added); *Lautsi – English Translations*, *supra* note 5, at 15.

141. As Professor Mancini has pointed out, many of the personal rights and liberties listed in the Italian Constitution were supported by the secular left, which obviously did not ground its support in the supposed origins of such rights in Christian or Catholic theology. See Mancini, *supra* note 2, at 187. Indeed, this line of reasoning seems to presuppose that there can be no ethic of human rights outside of Christianity or Catholicism.

a “secular” context different from the religious context that is its natural home, a highly educational symbolic function, regardless of the religion professed by the pupils.¹⁴²

In other words, the performative effect of displaying the crucifix in a public school classroom displaces its ordinary Catholic meaning with an alternative secular one, namely,

the religious origin of the values of tolerance, mutual respect, regard for the individual, the affirmation of his or her rights and regard for his or her liberty, freedom of conscience against authority, human solidarity, prohibition of every discrimination, all of which characterize the Italian civic order.¹⁴³

How and why the crucifix does this is unexplained, though the *Consiglio* is obviously indebted to the *Tribunale*’s comparable analysis. The *Consiglio* suggests that there is no other symbol “in Italian culture . . . better suited” to encapsulate these *secular* values “than the crucifix,”¹⁴⁴ and then defers to the Veneto Ministry’s judgment that the crucifix is the most effective means of teaching Italian civic virtue.¹⁴⁵

This argument implicitly concedes that the ordinary Catholic meaning of the crucifix is out of place in a public school. Accordingly, its display there must necessarily signify something *else*, something nonconfessional—like Italian constitutional and civic values—as if it were inconceivable that Italian public school authorities might violate the religious impartiality demanded by *laicità* by posting an obviously confessional symbol. In the view of the *Consiglio*, display of the crucifix

142. Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, at 16 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 22.

143. Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, at 16 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 22.

144. Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, at 17 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 23.

145. Cons. Stato, sez. sesta, 13 gennaio 2006, n. 556, at 18 (authors’ translation); *Lautsi – English Translations*, *supra* note 5, at 23.

in a public school *necessarily* displaces its ordinary Catholic meaning with the alternate, secular meaning of Italian civic unity, though it leaves unexplained why this must be the case.

c. (Almost) No Effect

The Grand Chamber of the ECtHR largely adopted the position of the Italian government that the “mere presence” of a “passive symbol” like the crucifix could not violate the Convention without proof that children were coerced or pressured or the teaching atmosphere otherwise lacked the religious impartiality.¹⁴⁶ Unlike the Italian government, however, which attributed various secular meanings to the crucifix,¹⁴⁷ the ECtHR decided the case without adopting any alternate meaning at all in place of the majoritarian Catholic significance it grudgingly admitted at the outset.¹⁴⁸ Conceding that classroom posting of crucifixes “confer[s] on [Italy]’s majority religion preponderant visibility in the school environment,” the court nevertheless agreed with the government that as “an essentially passive symbol” the crucifix “cannot be deemed to have an influence on pupils comparable to that of didactic speech or participation in religious activities,”¹⁴⁹ especially given lack of

146. *Lautsi & Others v. Italy*, Eur. Ct. H.R. (2011), no. 30814/06, 29–30 (Grand Chamber). Italy’s submission on this point was based on a study prepared by Professor Carlo Cardia, who later published it as a monograph. See CARDIA, *supra* note 11. Cardia is professor of ecclesiastical and canon law at the Università di Roma III, and a prominent figure in Italian academics and legal practice relating to law and religion. Professor Cardia was retained by the Italian Chamber of Deputies in connection with the lengthy negotiations between the Italian government and the Holy See that yielded the Villa Madama Accords that formally altered Italy from a Catholic confessional to a religiously impartial state. See generally *infra* notes 221–23 and accompanying text.

147. See, e.g., CARDIA, *supra* note 11.

148. *Lautsi & Others*, at 27–28 ¶ 66.

149. *Id.* at 29 ¶ 72. Based on a review of United States Establishment Clause decisions, Claudia Haupt has cogently argued that government display of visual religious symbols is no less problematic than its use of religious texts, and that finding a religious symbol constitutionally acceptable because it is “merely passive” overlooks that the government’s display of such symbols often violates the Establishment Clause by coercing viewers to violate their personal beliefs or by communicating strong government endorsement of religion. See generally Haupt, *Active Symbols*, *supra* note 6.

“compulsory teaching about Christianity” or other evidence that “the authorities were intolerant of pupils who believed in other religions, were non-believers or who held non-religious philosophical convictions.”¹⁵⁰

The ECtHR reasoned that the physical context of the public school classroom in which the crucifix is displayed neutralized its ordinary Catholic meaning even in the absence of an alternate secular meaning. Its decision constitutes an implicit judgment that the purportedly open, religiously neutral, and plural environment of Italian public schools diluted the ordinary Catholic meaning it would otherwise communicate to the point that it was apparently undetectable.

This contrasts with the ECtHR’s Second Section opinion, which held that the Convention requires government “to refrain from imposing beliefs, even indirectly, in places where persons are dependent on [government] or in places where they [are] particularly vulnerable,” such as elementary and middle schools.¹⁵¹ It seems a matter of common sense that “in countries where the great majority of the population owe allegiance to one particular religion the manifestation of the observances and symbols of that religion, without restriction as to place and manner, may constitute pressure on students who do not practice that religion or those who adhere to another religion.”¹⁵² The record showed that “it is impossible not to notice crucifixes in the classrooms,” and that the Italian government considers them “an integral part of the school environment.”¹⁵³ The Second Section therefore concluded that the ordinary Catholic meaning of the crucifix served to align the government with Catholicism:

The presence of the crucifix may easily be interpreted by pupils of all ages as a religious sign, and they will feel that they have been brought up in a school environment marked by a particular

150. *Lautsi & Others*, at 30 ¶ 74; *see also id.* (“In addition, the applicants did not assert that the presence of the crucifix in classrooms had encouraged the development of teaching practices with a proselytizing tendency, or claim that the [applicant children] had ever experienced a tendentious reference to that presence by a teacher in the exercise of his or her functions.”).

151. *Id.* at 11 ¶ 49.

152. *Id.* at 12 ¶ 50 (citation omitted).

153. *Id.* at 12 ¶ 54.

religion. What may be encouraging for some religious pupils may be emotionally disturbing for pupils of other religions or those who profess no religion. That risk is particularly strong among pupils belonging to religious minorities. Negative freedom of religion is not restricted to the absence of religious services or religious education. It extends to practices and symbols expressing, in particular or in general, a belief, a religion or atheism. That negative right deserves special protection if it is the State which expresses a belief and dissenters are placed in a situation from which they cannot extract themselves if not by making disproportionate efforts and acts of sacrifice.¹⁵⁴

By contrast, the Grand Chamber gave outsized importance to the margin of appreciation doctrine. Deferring to the Italian government by use of this doctrine theoretically implies that there is a nationally accepted secular understanding of the crucifix rooted in Italian history and culture. As we shall see, however, there is no authentic Italian narrative in which the crucifix functions as a secular historical-cultural symbol embraced by unbelievers and non-Catholics.¹⁵⁵

In sum, the Grand Chamber opinion simply and implausibly denies that display of the crucifix has any meaning or effect at all, its being just a “passive” symbol.

3. The Crucifix in Italian History and Culture

Like *Buono, Lautsi* involves assertions about Italian history and culture that underwrite the defense of the classroom crucifix displays: the ordinary Catholic meaning of the crucifix is displaced by alternate secular meanings (as the Italian courts held) or is displaced by the secular classroom context even if no alternate secular meaning takes its place (as held by the European Court of Human Rights Grand Chamber). Accordingly, one should be able to look for confirming evidence in

154. *Id.* at 12–13 ¶ 55.

155. See *infra* Parts II.B.3, III.

Italian history and culture of the proposed alternative secular meanings and effects of the crucifix (or the absence of confessional meaning and effect).

Italy has experienced wide swings and violent alterations in its forms of government and their relationship to the Papacy and the Church since just the mid-nineteenth century. This complex history can only be sketched here. We emphasize as well that our purpose is not to make normative judgments, but rather to test whether the claimed secular meanings and effects (or absent confessional meaning and effect) cohere with Italian history and culture.

a. Papal Absolutism

From the eighth through most of the nineteenth century, with some interruption, a swath of central Italy was ruled by the Pope as an absolute temporal monarch.¹⁵⁶ Beyond these Papal or Pontifical States, the Pope sought to impose his will on the feudal kingdoms of Europe even in what today we would call “secular” matters,¹⁵⁷ claiming the power to depose kings and emperors by his power of excommunication.¹⁵⁸

156. See MARIO ASCHERI, *THE LAWS OF LATE MEDIEVAL ITALY (1000-1500): FOUNDATIONS FOR A EUROPEAN LEGAL SYSTEM* 222, 276, 350 (2013); RÉMI BRAGUE, *THE LAW OF GOD: THE PHILOSOPHICAL HISTORY OF AN IDEA* 130–40 (Lydia G. Cochran trans., 2007); HARRY HEARDER, *ITALY: A SHORT HISTORY* 43–59 (Jonathan Morris ed. 2001).

Though formally absolute, the power of the Papacy over the States was often compromised by that of the Holy Roman Emperor and other feudal rulers, as well as the local nobility and generally endemic corruption. See ASCHERI, *supra* note 156, at 312–14; LUIGI BARZINI, *THE ITALIANS* 162, 302–05 (1977); HAROLD BERMAN, *LAW AND REVOLUTION* 90–91 (1983). As Galileo discovered, however, papal power was real enough to impose the Inquisition in the Papal States and the rest of Italy. See ASCHERI, *supra* note 156, at 278, 287–88; BARZINI, *supra*, at 314.

157. No meaningful distinction between “religious” and “secular” existed during the Middle Ages or the medieval and early modern periods; the Church and the State each exercised power in both realms. See, e.g., BRAGUE, *supra* note 156, at 136; Richard Schragger & Micah Schwartzmann, *Against Religious Institutionalism*, 99 VA. L. REV. 917, 928 (2013).

158. See, e.g., BERMAN, *supra* note 156, at 87, 94–98; Schragger & Schwartzman, *supra* note 157, at 928.

Both the crucifix and the Latin cross signified the temporal and spiritual power of Christianity and the Church throughout medieval Europe.¹⁵⁹ In the Papal States, the crucifix was ubiquitous in government venues and many commercial and private ones.

b. Opposition to Constitutional Government

Most of the Papal States fell to the armies of the Italian unification movement in 1861, which then proclaimed the Kingdom of Italy, a liberal, anti-clerical, constitutional monarchy governing most of the Italian peninsula.¹⁶⁰ Rome and its environs remained under papal control until 1870, when the new monarchy occupied and annexed Rome and confined the Pope to the tiny enclave of Vatican City, opening a schism with the Church that lasted nearly sixty years.¹⁶¹

The practical independence and political freedom of action afforded the Papacy by the Papal States vanished with its loss of Rome and the rest of the States.¹⁶² The Church's consequent exclusion from governing power in any part of Italy also undermined its ability to regulate the practice of Catholicism in its historical, cultural, and geographical homeland.¹⁶³

The annexation of Rome in 1870 unified Italy politically but not socially or culturally.¹⁶⁴ Outside of the Papal States, the Italian peninsula had consisted for centuries of shifting and diverse kingdoms, duchies, republics, city-states, and enclaves periodically occupied or controlled by

159. See PETER BROWN, *THE RISE OF WESTERN CHRISTIANITY: TRIUMPH AND DIVERSITY*, a.d. 200-1000, at 72, 391 (2nd ed. 2003); CARL ERDMANN, *THE ORIGIN OF THE IDEA OF CRUSADE* 35, 39, 135, 200, 226, 345-48 (Marshall W. Baldwin & Walter Goffart trans. 1977); cf. MALCOLM BARBER, *THE NEW KNIGHTHOOD* 66 (2012) (observing that medieval popes granted the Knights Templar the right to display the red cross on their tunics as a symbol of "their willingness to suffer martyrdom in the defence of the Holy Land.").

160. See HEARDER, *supra* note 156, at 187-97, 202-03.

161. See R.J.B. BOSWORTH, *MUSSOLINI* 236 (2002) [hereinafter BOSWORTH, *MUSSOLINI*]; HEARDER, *supra* note 156, at 187-97, 203-04; SERGIO ROMANO, *LIBERA CHIESA, LIBERO STATO?* 15 (2005).

162. See ROMANO, *supra* note 161, at 30; Ventura, *supra* note 89, ¶ 3, at 24.

163. See ROMANO, *supra* note 161, at 46.

164. Alessandro Ferrari, *Civil Religion in Italy: A "Mission Impossible"?*, 41 GEO. WASH. INT'L L. REV. 839, 841-42 (2010) [hereinafter A. Ferrari, *Civil Religion in Italy*]; see HEARDER, *supra* note 156, at 165.

foreign powers.¹⁶⁵ In short, the people of the new Italian state had little in common other than Roman Catholicism.

Pope Pius IX, however, moved quickly to prevent Catholicism from being used to unify the peoples of Italy. Aiming at the restoration of the Papal States (especially Rome),¹⁶⁶ and deeply suspicious of liberal, constitutional, and other modernist values,¹⁶⁷ he issued the *non expedit*, which declared it “not expedient” for Catholics to participate in the political life of the new state by voting, holding office, participating in its functions, or otherwise recognizing its legitimacy.¹⁶⁸ Enforced by the Pope’s power of excommunication,¹⁶⁹ the *non expedit* was a powerful obstacle to effective government in the early years of the monarchy, especially in the South, splitting the Kingdom into pro- and anti-Catholic factions and foreclosing any possibility that Catholicism might act as a unifying national force.¹⁷⁰

165. See e.g., BARZINI, *supra* note 156, at 352ff (depicting maps showing the multitude of shifting civil-political jurisdictions on the peninsula between 1500 and 1810); HEARDER, *supra* note 156, at 42, 86, 137, 156, 159, 195 (same between 600 and 1870).

166. Pius IX is reported to have exclaimed, “Rome is mine[!],” whenever the Kingdom of Italy was mentioned in his presence. R.J.B. BOSWORTH, MUSSOLINI’S ITALY: LIFE UNDER THE DICTATORSHIP 258 (2006) [hereinafter BOSWORTH, MUSSOLINI’S ITALY].

167. See, e.g., FRANCESCO BARBAGALLO, L’ITALIA REPUBBLICANA 15 (2009). In 1864, Pius published the controversial *Syllabus* listing the many “grave errors” of modernism, including legalization of divorce, abolition of temporal papal authority, state recognition of religions other than Catholicism, elimination of Catholicism as the only state religion, freedom of religious exercise for non-Catholics, separation of church and state, freedom of thought and opinion, and the idea of progress. See ALESSANDRO FERRARI, LA LIBERTÀ RELIGIOSA IN ITALIA: UN PERCORSO INCOMPIUTO 17 (2012) [hereinafter A. FERRARI, LA LIBERTÀ RELIGIOSA]; Zachary R. Calo, *Catholicism, Liberalism, and Human Rights*, J. CHRISTIAN LEG. THEORY 7–8 (2011), available at <http://www.clsnet.org/document.doc?id=273>.

168. HEARDER, *supra* note 156, at 203; ROMANO, *supra* note 161, at 17; see also Ventura, *supra* note 95 ¶ 36, at 34 (“Pius IX rejected any compromise implying the end of the temporal power of the Holy See and the recognition of the Kingdom of Italy . . .”).

169. ROMANO, *supra* note 161, at 21–22; Ventura, *supra* note 95, ¶ 36, at 34–35.

170. See BOSWORTH, MUSSOLINI’S ITALY, *supra* note 166, at 15; see also BARZINI, *supra* note 156, at 335 (“The Kingdom was undermined by the alliance of the popular classes with the Church, the incredulity of the majority of its citizens, and the national character.”).

Nevertheless, the Kingdom of Italy succeeded in introducing substantial religious liberty and in liberalizing the law of church and state, despite its formally confessional character and the determined opposition of the Church.¹⁷¹ Its policy was captured in Camillo Cavour's phrase, "[a] free Church in a free State."¹⁷² These were accompanied, however, by widespread suppression of Catholic orders and institutions and expropriation of their property.¹⁷³ Speaking of the Kingdom of Italy after unification, Professor Ventura observed that "liberalism was its political source of inspiration, secularized (often anti-clerical) bourgeois society was its social reference, and policies limiting the influence of the Catholic Church and expanding the powers of the State in areas traditionally reserved to the Church were its natural implication."¹⁷⁴

c. Alignment with Fascism

Benito Mussolini established a Fascist dictatorship in the early 1920s, though he retained the monarchy as part of the formal constitutional apparatus.¹⁷⁵ Italian Fascist ideology was profoundly anti-clerical and had even less use for Catholicism than the liberal ideology it displaced.¹⁷⁶ Having come to power by a threatened coup,¹⁷⁷ however, Mussolini's government had a legitimacy problem, which he proposed to solve by courting the support of the Church.¹⁷⁸ The Fascist government

171. See A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 843; Pin, *supra* note 11, at 111 n.103; Ventura, *supra* note 95, ¶¶ 39, 42, at 36–37.

172. See ROMANO, *supra* note 161, at 73 (authors' translation).

173. See Ventura, *supra* note 95, ¶ 44, at 38.

174. Ventura, *supra* note 95, ¶ 36, at 34.

175. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 180–83; HEARDER, *supra* note 156, at 225–29.

176. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 176, 257, 259; Ventura, *supra* note 95, ¶ 47, at 40. Nevertheless, there was a significant Catholic presence in Italian Fascism from the beginning. See ROMANO, *supra* note 161, at 47.

177. Italy officially entered the Fascist era on October 30, 1922, when King Vittorio Emanuele III was intimidated into asking Mussolini to form a government after the latter's "March on Rome" with an armed Fascist militia. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 181–82.

178. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 176, 257; see ROMANO, *supra* note 161, at 70 ("Mussolini was a 'Catholic of convenience,' protecting the Church for the 'value added' it conferred on his politics in Italy and the world.") (authors' translation).

began to rebuild the Church/State relationship that had fractured with unification and the annexation of Rome,¹⁷⁹ including unilateral issuance of the crucifix decrees at issue in *Lautsi*,¹⁸⁰ and otherwise signaled that it was open to reconciling the Italian state with the Church. The Pope, for his part, had still not fully accepted the Italian state,¹⁸¹ but by then had also decided that liberalism, socialism, and communism were bigger threats than Fascism.¹⁸²

Negotiations eventually yielded the “Lateran Pacts,” a “treaty” between the Kingdom of Italy and the Church named for the Vatican palace in which they were executed. They expressly provided for recognition of the Papacy as a tiny but sovereign entity demarcated by the borders of Vatican City, and formally declared Roman Catholicism the sole state religion of Italy, with accompanying powers and privileges including tax exemption and compulsory teaching of Catholicism in public schools.¹⁸³ The Church also received an enormous sum as reparations for its loss of Rome and the Papal States, as well as continuing financial support for its “social welfare” ministries. In return, the Church officially recognized the Kingdom of Italy and thus, by unmistakable implication, the legitimacy of Mussolini’s dictatorial government.¹⁸⁴

Mussolini and the Church both got what they wanted.¹⁸⁵ Italy’s treaty with the Church legitimized Mussolini and Fascism at home and

179. See A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 33–34; Ventura, *supra* note 95, ¶ 47, at 39–40.

180. See A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 33–40; *supra* notes 161–170 and accompanying text.

181. See ROMANO, *supra* note 161, at 49.

182. BOSWORTH, *MUSSOLINI’S ITALY*, *supra* note 166, at 259, 374; ROMANO, *supra* note 161, at 33, 37–38, 68; Ventura, *supra* note 95, ¶ 52, at 41 (“[F]ascists and most Catholics shar[ed] the same loathing not just for socialism and communism, but also for the enlightenment, democracy and liberalism, all deemed foreign ideas not belonging to the Italian Catholic tradition. The Fascist cult for order and discipline, authority and hierarchy, also did not displease a Church still obdurately opposed to pluralism, democracy, and civil liberties.”).

183. HEARDER, *supra* note 156, at 230; ROMANO, *supra* note 161, at 74.

184. BOSWORTH, *MUSSOLINI’S ITALY*, *supra* note 166, at 257; HEARDER, *supra* note 156, at 230; ROMANO, *supra* note 161, at 74–75.

185. See A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 29; ROMANO, *supra* note 161, at 145.

abroad and enabled consolidation of their already considerable power.¹⁸⁶ For the Church, the Lateran Pacts undid the liberal reforms protecting institutional and individual religious liberty, reconfessionalizing Italy as an exclusively Catholic state and subjecting non-Catholic religions to discriminatory burdens,¹⁸⁷ while also initiating a *de facto* alliance with Fascism that lasted from 1929 through at least the fall of Mussolini's first government in 1943.¹⁸⁸ The pope who negotiated the Pacts, Pius XI (1922-39), welcomed Fascism as an ally in the Church's fight against democracy, liberalism, pluralism, socialism, and communism.¹⁸⁹

186. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 238-39.

187. A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 171, at 29-32.

188. See, e.g., BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 231 (concluding that the Pacts marked "the embrace of Fascist totalitarianism by the public forms of Catholicism," and characterizing the Church's relation to the Fascist regime as a kind of "wedlock" or "cohabitation"); *id.* at 238 (describing Mussolini's brother's "highest delight" at the thought of an Italian people who could now reconcile their everyday inspiration from Catholicism with their nation state. The papal paper, *L'Osservatore Romano*, applauded a pact whereby "Italy has been given back to God and God to Italy." The Jesuit journal, *Civiltà Cattolica*, in March 1929 agreed that Fascism incarnated "the restoration of a Christian society."); *id.* at 257 (Pius XI disclosing to Mussolini that he prayed morning and night to the latter's guardian angel); ROMANO, *supra* note 161, at 75 ("And perhaps what was needed was a man like the one Providence sent our way; a man who without the preoccupations of liberal-minded men for whom all those laws, may we say, and all those regulations were as much fetishes and, precisely as fetishes, the more intangible and venerated, the more ugly and deformed.") (quoting Pius XI's description of Mussolini) (authors' translation); see also BOSWORTH, MUSSOLINI, *supra* note 161, at 238 (noting that for a time, Pius "favoured something which he called 'Catholic totalitarianism'").

The post-Lateran era is replete with examples of endorsements of and expressions of sympathy for Fascism by lower-ranking Catholic clerics. ROMANO, *supra* note 161, at 72; e.g., BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 239, 259, 489; ROMANO, *supra* note 161, at 84-85.

189. BOSWORTH, MUSSOLINI, *supra* note 161, at 258. Mussolini and Pius XI accepted that the church and state shared enough in their views of the social and gender order at home and in regard to Malta, the USSR and a number of other issues abroad for accommodation to remain the best policy. Fascism, the Pope said, stood for "order, authority, and discipline," none of them contrary to the Catholic way of thinking. *Id.* Mussolini and the Church nevertheless had plenty of disagreements, and Pius XI issued encyclicals against Fascist and Nazi excesses. See GIANNI LONG, ALLE ORIGINI DEL PLURALISMO CONFESIONALE: IL DIBATTITO SULLA LIBERTÀ RELIGIOSA NELL'ETÀ DELLA COSTITUENTE 212-13 (1990).

The relationship between Fascism and the Church deepened with the election of Pius XI's successor, Pius XII (1939-58). Pius XII not only shared his predecessor's view of Fascism as a bulwark against contemporary political and social movements opposed by the Church,¹⁹⁰ he was more cautious about criticizing the regime and less reticent about cooperating with it.¹⁹¹ Pius XII's family, additionally, had close ties to the Bank of Rome, which was a crucial source of Fascist financing.¹⁹²

As we discuss in more detail below,¹⁹³ Pius XII is a figure of great controversy. Professor Bosworth's measured assessment of his attitudes observes that

there has been an absurd and lengthy debate whether or not Pius XII was 'Hitler's pope,' a warrior who de facto served the German side of the conflict. Of course he did not. The Church authorities judged Nazism before and after 1939 an ungodly movement. It is fairer, however, to see Pius and the hierarchy over whom he presided as

190. See BOSWORTH, MUSSOLINI, *supra* note 161, at 348-49.

[T]he elevation of Pius XII was welcomed among the Fascist leadership, as it should have been, given the new Pope's family background in Italian high finance, fervent anti-communism and preference for Fascism over other modern ideologies which kept in thrall a sinful mankind. Despite further jars with Mussolini, in his occupation of the papal chair Pius XII heralded no rupture in the cohabitation between Church and State in Fascist Italy.

Id.

191. ROBERT A. VENTRESCA, *SOLDIER OF CHRIST: THE LIFE OF POPE PIUS XII* 66, 90, 95, 131, 150-53 (2013) (concluding that as Vatican Secretary of State, Cardinal Pacelli had moderated strident criticisms of Fascism and Nazism that Pius XI had been inclined to issue, and continued this tendency when he was elevated as Pope Pius XII); see also *id.* at 142-43 (observing that members of Mussolini's government were pleased with Pacelli's election as pope because they expected him to act more favorably towards Fascism than had Pius XI, based on Pacelli's sympathy for Franco and the Falangists, "his constructive working relationship with Fascist Italy, and his continued pursuit of better relations with Hitler's regime . . .").

192. BOSWORTH, MUSSOLINI, *supra* note 161, at 237, 348.

193. See *infra* Part II.B.3.d.

fellow travellers or outright sympathizers with Mussolini and Fascism. In what they perceived as this wicked world, the Vatican liked most of what they saw in Fascism and . . . preferred it probably to liberal democracy and certainly to socialism and communism. All in all, the Church's wartime stance towards the dictatorship was not very different from that prevailing among [Italian] businessmen and landowners, who thought that Fascism, despite its eccentricities, was fine for them until it became obvious that it was going to lose its battles on every front.¹⁹⁴

d. Fascist-Era Anti-Semitism

It is not true, as Italians sometimes suggest,¹⁹⁵ that anti-Semitism was largely unknown in pre-war Italy.¹⁹⁶ Hostility to Jews is deeply rooted in Italian and Catholic history (as it is in other religions and elsewhere in the West).¹⁹⁷ Jews in the Papal States were subjected to the Inquisition, and humiliations and disabilities imposed on them as late as the 19th century bore a disquieting resemblance to those instituted by the Nazis in advance of the Holocaust.¹⁹⁸ For centuries the Church had taught that the burdens borne by Jews in Europe were the natural and

194. BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 490.

195. See, e.g., BARZINI, *supra* note 156, at 315; BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 419.

196. See BOSWORTH, MUSSOLINI'S ITALY, *supra* note 166, at 417; ROMANO, *supra* note 161, at 87.

197. See, e.g., VILADESAU, BEAUTY OF THE CROSS, *supra* note 53, at 108, 167 (detailing anti-Semitism in Catholic theology and art during the Middle Ages); VILADESAU, TRIUMPH OF THE CROSS, *supra* note 114, at 97, 99, 146–47, 150 (same in Catholic and Protestant theology, art, and theatre during the late medieval and early modern eras).

198. For example, in 1516 Roman Jews were ordered by the Papacy to wear a blue hat or scarf marking them as non-Christians, and were confined to a walled ghetto with guarded gates. These restrictions were enforced until Rome was annexed in 1870. See, e.g., CORRADO AUGIAS, THE SECRETS OF ROME 352–56, 359–62 (Lawrence Jenkins trans., 2007).

deserved consequence of their having rejected the true Savior and his New Testament.¹⁹⁹

By the pre-war era, Catholic teaching distinguished acceptable “discrimination” against Jews from their unacceptable “persecution.” The Church condemned anti-Jewish violence, but generally supported discriminatory legislation that sought to restrict Jewish influence on Catholic society, at least in Italy.²⁰⁰ Having rejected the Christian revelation, Jews were viewed as a continuing threat to properly constituted Christian societies, and thus could be treated as second-class citizens.²⁰¹ Pre-war popes also reflexively associated Jews with communism, liberalism, modernism, socialism, and other enemies of the late 19th and early 20th century Church.²⁰²

Catholic teaching, however, understood Judaism as a religion and a culture, not as a supposed race.²⁰³ The Church viewed Jews who converted to Catholicism as no longer Jewish, and it consistently protested Fascist application of Jewish racial laws against Catholic converts.²⁰⁴ Fascist-era efforts to intervene on behalf of all Jews, however, were rare.²⁰⁵ For example, the Church never generally condemned Mussolini’s 1938 anti-Jewish racial laws, except as they affected Jewish converts to Catholicism and Jews married to Catholics.²⁰⁶ Discrimination against observant Jews resonated with the Church’s belief

199. See, e.g., ROMANO, *supra* note 161, at 87; VENTRESCA, *supra* note 191, at 9.

200. ROMANO, *supra* note 161, at 87; SUSAN ZUCCOTTI, UNDER HIS VERY WINDOWS: THE VATICAN AND THE HOLOCAUST IN ITALY 56 (2002).

201. ROMANO, *supra* note 161, at 86–87.

202. See A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 171, at 35; BOSWORTH, MUSSOLINI’S ITALY, *supra* note 166, at 258, 262, 374, 415; ROMANO, *supra* note 161, at 86–87. Because unification eliminated ghettoization of Italian Jews and introduced religious equality, papal anti-Semitism often overlapped with the papacy’s hostility to the Kingdom of Italy. See VENTRESCA, *supra* note 191, at 176; ZUCCOTTI, *supra* note 200, at 10, 15.

203. ZUCCOTTI, *supra* note 200, at 15, 22.

204. RONALD J. RYCHLAK, RIGHTEOUS GENTILES: HOW PIUS XII AND THE CATHOLIC CHURCH SAVED HALF A MILLION JEWS FROM THE NAZIS 86–87 (2005); ZUCCOTTI, *supra* note 200, at 50–51.

205. See *infra* note 209 and accompanying text.

206. See Ventura, *supra* note 95, ¶ 61, at 44. In fairness, the 1938 laws provoked little popular opposition among lay Italians. BOSWORTH, MUSSOLINI’S ITALY, *supra* note 166, at 420.

that the practice of Judaism subverted the Christian message and thus justified measures to reduce Jewish influence.²⁰⁷

Whether the Fascist-era popes—Pius XI and especially Pius XII—were unacceptably passive in the face of the Holocaust is a matter of enormous factual and ethical controversy. Their defenders argue that they acted courageously, doing the most that could have been done given the dire circumstances of the Church.²⁰⁸ Papal detractors, on the other

207. See ZUCCOTTI, *supra* note 200, at 33.

The terrible truth is that [Pius XI and Pius XII] were not opposed to moderate measures separating Jews from Christian society. That attitude continued throughout the war and complicated every decision. With each week and month that passed it became more awkward and difficult to oppose measures that should have been denounced from the onset.

Id. at 319.

208. Professor Rychlak argues that Pius XI and Pius XII both issued encyclicals and statements criticizing Fascism and Nazism and otherwise condemned anti-Semitism. See, e.g., RYCHLAK, *supra* note 204, at 23–41 *passim*, 91–93, 97, 112–19, 124–28, 155; accord VENTRESCA, *supra* note 191, at 174 (observing that Pius XII’s 1942 Christmas address “alluded in general terms to those who solely because of their nation or their race, have been condemned to death or progressive extinction.”). Once the war started, the Vatican, as a sovereign country, was obliged to maintain its neutrality by both international law and the threat of invasion, with the attendant threat of arrest of the Pope himself. See ROMANO, *supra* note 161, at 91–92; RYCHLAK, *supra* note 204, at 17–18, 123–24, 133–36; VENTRESCA, *supra* note 191, at 166–67; ZUCCOTTI, *supra* note 200, at 206–07, 220, 315–16. Short of actual invasion, Fascists or Nazis could have easily laid siege to the Vatican, cutting off food, fuel, power, and most contact with the outside world. See ROMANO, *supra* note 161, at 88 (describing the threatening and isolated circumstances of Pius XII during the Fascist era, especially after the German occupation in 1943).

It is undeniable, finally, that courageous Catholic clerics in Italy—including the cardinal archbishops of Genoa, Florence, Milan, and Turin, and some Vatican clerics (perhaps including Pius himself)—ran great risks to hide and protect thousands of Jews from arrest, internment, and deportation under the German occupation; some paid with their lives. See, e.g., RYCHLAK, *supra* note 204, at 18, 101, 105; ZUCCOTTI, *supra* note 200, at 87–88, 189–92, 199, 202–06, 212–13, 233–64 *passim*. These efforts, it is suggested, were directed behind the scenes by Pius XII because he could not openly challenge the Fascists or the Nazis. See, e.g., RYCHLAK, *supra* note 204, at 7, 101–02, 130–33, 138, 255; see also VENTRESCA, *supra* note 191, at 299, 307. Finally, it is suggested that an apparently greater percentage of Jews survived in Italy—substantially more than 80% of the pre-war population of about 45,000—than anywhere else in Europe. See LONG, *supra* note 189, at 283; see also BOSWORTH,

hand, contend that defenses of the Fascist-era popes are myths built on repetition and exaggeration encouraged by the Church.²⁰⁹

MUSSOLINI'S ITALY, *supra* note 166, at 472 (observing that about 7,000 Italian Jews perished in concentration camps).

209. Pius XI's encyclicals, for example, did not condemn Fascism or Nazism as such or for their persecution of Jews, but only for their offenses against the Church. See LONG, *supra* note 189, at 213; VENTRESCA, *supra* note 191, at 117, 126–27, 177. As we indicated above, neither pope was fundamentally opposed to discriminatory measures designed to safeguard Christian society against disproportionate Jewish influence, see *supra* notes 200–202 and accompanying text, and they and other Church leaders welcomed Fascism as an ally against the Church's many 20th century enemies, see *supra* notes 189–194 and accompanying text.

No written evidence or first-hand account has ever emerged of a general directive by Pius XII that Vatican officials and Catholic orders and clerics assist Jewish fugitives during the Fascist era, even in Italy or strongly Catholic countries where the Church enjoyed grassroots influence. See, e.g., VENTRESCA, *supra* note 191, at 308; ZUCCOTTI, *supra* note 200, at 101, 114–15, 192, 180, 236, 238, 243, 245, 253, 258–59, 263–64, 281. No general public condemnation of Fascist or Nazi anti-Semitism was ever issued, even after the possibility of Axis occupation or a siege was eliminated by the Allied liberation of Rome (June 4, 1944) or, indeed, the end of the war itself (May 6, 1945). VENTRESCA, *supra* note 191, at 177, 219, 229, 310; see ZUCCOTTI, *supra* note 200, at 283. While some clerics courageously hid and protected Jews during the German occupation, see *supra* note 208, most did not. See, e.g., ZUCCOTTI, *supra* note 200, at 201 (noting that of the 1,272 Catholic orders and institutions and additional “hundreds of parish churches” operating in Rome during the German occupation, only 155 are claimed by the Vatican to have sheltered Jews); see also VENTRESCA, *supra* note 191, at 230 (same regarding 180 Catholic institutions). Many Italian clerics embraced even the extreme measures imposed during the German occupation, ROMANO, *supra* note 161, at 93–95; ZUCCOTTI, *supra* note 200, at 258, 268–73, and the Vatican itself was conflicted about its own sheltering of Jews and the appropriateness of such aid by other Italian clerics. See ZUCCOTTI, *supra* note 200, at 45–46, 206–10, 192, 195, 219–31, 256–58, 281–85. Interventions by Pius XII and other Vatican officials, it is argued, were cautious, vague, polite, and few, usually put forward on behalf of Jewish converts to Catholicism and Jews married to Catholics, and rarely decisive in the actual rescue of Jews. See, e.g., VENTRESCA, *supra* note 191, at 147, 177–80, 189; ZUCCOTTI, *supra* note 200, at 3, 50–51, 64–69, 78, 101–46 *passim*, 218–19, 272–73, 292. Professor Zuccotti praises the Vatican for eventual efforts late in the war on behalf of Jews facing deportation from Italian occupation zones in Croatia and southeastern France, and from Hungary. ZUCCOTTI, *supra* note 200, at 125–26, 129–31, 293–94.

Finally, however one presents the numbers, by the end of the war Italian Jews had been reduced to substantially less than half of their prewar population by immigration, “defensive” conversion to Catholicism, and deportation to death camps. See LONG, *supra* note 189, at 283.

We cannot resolve these controversies here.²¹⁰ However, whatever Pius XI and XII, the Vatican, and the Church may or may not have done for Jews during the Fascist era, it cannot be denied that their greatest focus was on protecting Catholic interests—aligning the Church with Fascist Italy to obtain recognition of its temporal sovereignty, reconsecrate Italy, and obtain reparations for loss of the Papal States; negotiating a concordat with the Nazi regime to protect the Church’s members and interests in Germany; tailoring its pronouncements and actions during the war to safeguard Vatican neutrality and forestall occupation or siege; and intervening mostly on behalf of Jewish converts and Jews in mixed marriages rather than for Jews in general.²¹¹ When these interests conflicted with the protection of Jews—even Italian Jews—the popes, the Vatican, and the Church usually favored their own interests over those of the Jews, though some

210. Professor Ventura offers this nuanced assessment of Papal and Church conduct with respect to Italian Jews during the war:

From 1938 to 1945, Italian racial laws under the alliance between Italian fascism and German Nazis, exerted a heavy toll on Italian Jewish communities, in particular in Rome. The debate is still open on the responsibilities of individual Catholics and of the Catholic Church as a whole. While experts have exposed the heavy involvement of Italian Catholics in the anti-Jewish persecution, the dominant narrative in the media is that the diplomatic wariness of the Holy See was inevitable, and that eventually Catholic institutions proved friendly to the Jewish people.

Ventura, *supra* note 95, ¶ 19, at 28; *see also id.*, ¶ 61, at 44 (“Confronted with anti-Semitism leading to deportations to concentration camps and to the holocaust, Catholics split: some of them did their best to protect threatened Jewish people, but many others concurred in the persecution through omission or connivance.”).

211. *See* ZUCCOTTI, *supra* note 200, at 323 (describing Vatican officials’ “narrow focus on their own Catholic constituency” during the Fascist era, and their view that the Vatican was obliged to “concentrate its resources and energies on the Catholic faithful, so threatened by the modern world”); VENTRESCA, *supra* note 191, at 177, 178 (Pius XII “shared the conventional view that Jewish questions were not the primary concern of the church. . . . [As secretary of state], the future Pius XII did not believe he had the authority, or the responsibility, to defend the civil rights of German Jews as vigorously as he defended German Catholics.”); Ventura, *supra* note 95, ¶ 61, at 44 n.86 (noting historian Giovanni Miccoli’s conclusion that during the Fascist era neither the Catholic Church nor Christian churches generally viewed protecting Jews, even from deportation and extermination, as a pressing concern).

Italian and Vatican clerics individually (and heroically) chose differently.²¹² This prioritization of the Church's interests and constituencies when confronted with Fascism and Nazism seriously undercuts the claim that the crucifix can be sensibly viewed as a mere secular symbol of Italian history and culture or the constitutional protection of all Italians.²¹³

e. Catholic Confessional Republic

Post-war Italy chose liberal democracy in a 1946 referendum,²¹⁴ but Pius XII and the Church proved to be insurmountable obstacles to implementation of Italy's liberal-democratic Constitution. Jews, Protestants, and every other non-Catholic religion, along with a secular left of social democrats, socialists, and communists, endorsed a nonconfessional state with individual and institutional religious equality, as was indeed provided by the text of the proposed Constitution.²¹⁵ This would have necessitated repudiation or substantial amendment of the Fascist-era Lateran Pacts, which privileged the Church and severely constrained the religious liberty of non-Catholic individuals and institutions.²¹⁶

Non-Catholic endorsement of religious equality drew a rebuke from Pius XII, who publicly accused Jews and Protestants of conspiring with leftist unbelievers to deprive the Church of its rightful, preeminent place in Italy, invoking the traditional teaching that constitutional protection was appropriate only for religious *truth*, meaning the Church and its teaching.²¹⁷

212. This is one of Zuccotti's primary claims. *See, e.g.,* ZUCCOTTI, *supra* note 200, at 48–54, 69, 87–89, 189–92, 199–204, 218–20, 235–37, 244–45, 252–53, 257–61; *accord* VENTRESCA, *supra* note 191, at 78–86, 92, 99–103, 146–47, 189–92, 221.

213. *See, e.g.,* ZUCCOTTI, *supra* note 200, at 69 (noting that until the papacy of John XXIII, “it was not considered self-evident that the Catholic Church should champion the rights of those outside its fold.”); *see also* Calo, *supra* note 167, at 3–4 (noting Church's transformation since mid-19th century from staunch opponent to powerful defender of liberal-democratic rights and values).

214. Ventura, *supra* note 95, ¶ 64, at 45.

215. *See* Pin, *supra* note 11, at 113–114. Ventura, *supra* note 95, ¶ 65, at 45.

216. *E.g.,* A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 171 at 44; LONG, *supra* note 189, at 236, 288–89, 293–98.

217. LONG, *supra* note 189, at 214, 217–20.

Pius thus insisted on constitutionalization of the Pacts without alteration, despite their flat contradiction of religious liberty and equality guarantees in the proposed Constitution.²¹⁸ As Professor Alessandro Ferrari has observed, the Church again, as it did in first negotiating the Pacts, placed protection of its own confessional interests over general provisions that would have equally protected the religious liberty of all.²¹⁹

The secular left eventually compromised by agreeing to include the Pacts in the Constitution, on the understanding that the Church and the new Italian republic would renegotiate their provisions to bring them into harmony with the Constitution.²²⁰ This not only left the Church entrenched in its traditional position of power and privilege,²²¹ it also left intact the odious Fascist-era requirement that non-Catholic religions obtain express state permission before they could legally operate in Italy as religions.²²²

During what has become known as the “First Republic,” the Church strongly influenced Italian politics and government through its ally, the Christian Democratic Party or “DC.”²²³ Although not a confessional party, the DC was subject to papal influence, as evidenced by its formation of early coalition governments with post-war monarchists and fascists to avoid sharing power with the Church’s

218. LONG, *supra* note 189, at 215–16; 236; *see also* Ventura, *supra* note 95, ¶ 66, at 46.

[The] Constitution [of 1948] was not the Constitution of a Catholic State. This could not be the Catholic State of the *Ancien Regime* tradition, nor of the age of liberalism; nor of course could it be a Catholic State in the Fascist sense. Catholic Italy was still there, socially and politically, and to some extent legally, but Italy was now framed with a Constitution based on pluralism, freedom, and equality.

Id.

219. A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 848.

220. A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 44, 45; LONG, *supra* note 189, at 318–19. *See* Ventura, *supra* note 95, ¶ 66, at 46.

221. A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 57.

222. *Id.* at 54; LONG, *supra* note 189, at 281–82; Pin, *supra* note 11, at 119.

223. A. FERRARI, *LA LIBERTÀ RELIGIOSA*, *supra* note 171, at 44; A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 845; Pin, *supra* note 11, at 137; Ventura, *supra* note 95, ¶ 67, at 46.

enemies on the secular left,²²⁴ its post-war policy of channeling national tax dollars to the reconstruction of Catholic cathedrals destroyed in the war, but not synagogues or Protestant churches,²²⁵ and its determined opposition to liberal reforms opposed by the Church, such as civil divorce and abortion (legalized over papal and DC opposition only in the early 1970s and late 1980s, respectively).²²⁶

The renegotiation of the Lateran Pacts was not concluded until the Villa Madama Accords in 1984—almost 40 years after ratification of the liberal-democratic Constitution and 20 years after the Second Vatican Council belatedly endorsed freedom of religious belief and worship as fundamental personal and group rights.²²⁷ The Accords eliminated the Church's status as the state church of Italy, along with some of its related privileges, though they permit Catholic teaching in public schools for students who desire it,²²⁸ and expressly note that Catholicism is part of the "historical legacy" of the Italian people. Only after Villa Madama did Italy ratify long-negotiated agreements that legally recognized Jewish and Protestant communities.²²⁹ Similar agreements with less familiar groups such as the Jehovah's Witnesses and The Church of Jesus Christ of Latter-day Saints had to await the fall of the DC in 1992.

224. VENTRESCA, *supra* note 191, at 238, 245–49. See BARBAGALLO, *supra* note 161, at 15 (observing that even in the late 1940s the Church remained aligned with the "authoritarianism of the right and struggled to adjust to political democracy") (authors' translation); LONG, *supra* note 189, at 224 (observing that the Church was fervently condemning liberalism as late as 1946); VENTRESCA, *supra* note 191, at 243–45 (recounting Pius's sympathy for Italian monarchists and his hostility to the left, including authorization of excommunication for any Catholic member of the Italian Communist Party).

The DC often resisted papal overtures, making clear that it was a "center-left" party "open to the right." See VENTRESCA, *supra* note 191, at 249.

225. LONG, *supra* note 189, at 293.

226. A. FERRARI, LA LIBERTÀ RELIGIOSA, *supra* note 171, at 59, 60–61.

227. Ventura, *supra* note 95, ¶ 69, at 48. Italian courts had begun to undermine the Lateran Pacts in the 1970s, *see id.* at ¶ 69, at 47–48, while an increasingly liberal electorate foreshadowed that change was inevitable, *id.* ¶ 69 at 48.

228. Pin, *supra* note 11, at 118; Ventura, *supra* note 95, ¶ 71, at 49.

229. Ventura, *supra* note 95, ¶ 71, at 49.

f. Universal Protector of Human Rights

After the deconfessionalization of Italy and the demise of the DC, the Church struggled to find a new political identity. Building on the postwar myth that the Church had saved Italy from totalitarian disasters on the right and the left,²³⁰ on the Vatican's recognition of universal religious liberty,²³¹ and finally on Villa Madama's express recognition of Catholicism as an Italian historical-cultural legacy,²³² the Church reconceptualized itself as a universal "human-dignity umbrella" which sheltered all people in the exercise of the freedom of religion and belief, regardless of the character of that belief or, indeed, unbelief. This enabled a presentation of the Church as the guardian and protector of human rights for all Italians and, indeed, all of humankind.²³³ This reasoning is evident in the Italian court opinions in *Lautsi* which contend that the crucifix is a secular signifier of liberal-democratic values and the historic relationship of the Italian people with Christianity.²³⁴

* * *

Within the last two centuries, therefore, the Church whose beliefs are ordinarily signified by the crucifix has:

- (a) Ruled central Italy as an absolute monarch;
- (b) Bitterly fought the unification and modernization of Italy under a liberal (albeit anti-clerical) constitutional monarchy;
- (c) Successfully overturned religious egalitarian reforms and restored Catholicism as the privileged state religion by aligning itself with Fascism through the Lateran Pacts;

230. See A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 847–48.

231. See Calo, *supra* note 167, at 1–2. John Paul II, the pope who oversaw the deconfessionalization of Italy under the Villa Madama Accords, was also the pope who made human rights a central concern of the Church. *Id.* at 9.

232. See, e.g., A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 851; Pin, *supra* note 11, at 121.

233. See Calo, *supra* note 167, at 1–2.

234. See *supra* Parts II.B.2.a–b.

- (d) Officially navigated the shoals of the Fascist era by prioritizing Catholic interests over those of Italian and other European Jews, though some of its clerics individually chose to protect and rescue Jews from Fascist and Nazi threats;
- (e) Blocked the establishment of a religiously impartial liberal-democratic state for almost 40 years after the fall of Fascism, contrary to express constitutional guarantees and the unanimous opposition of non-Catholics and the secular left; and finally,
- (f) Fashioned only in the last generation an identity as protector of religious liberty and other human rights for all Italians and all people.

It seems unlikely that Church teachings and practices of barely 30 years duration have displaced centuries in which the Church subordinated unbelievers and non-Catholics to its own priorities and interests.²³⁵ But if the relatively brief periods in which the Church has recognized personal religious freedom (about a half century) and renounced its claims to preeminent status as the state religion of Italy (about a quarter century) have indeed served to displace the ordinary Catholic meaning of the crucifix, one would find confirmation in contemporary Italian culture. One would see non-Catholic and unbelieving Italians, as well as human rights and other secular activist groups, using the crucifix as a secular sign of freedom of religion, *laicità's* guarantee of state religious even-handedness, and secular human rights for all humankind.

Unsurprisingly, non-Catholic and unbelieving use of the crucifix is unknown in contemporary Italian culture. Neither Jews nor Protestants nor Muslims, nor secular human rights organizations, nor anyone other than the Church and its practicing Italian members uses the

235. Cf. Beaman, *supra* note 10, at 96 (noting the dubious historical assumption that all Italians—not just Italian Catholics—have experienced Catholicism as an unqualified good that has not infringed religious or other freedoms); A. Ferrari, *Civil Religion in Italy*, *supra* note 164, at 841 (suggesting that rather than a unifying civil religion Italy has had “a church-religion aiming to establish a ‘protected democracy’ . . . subordinated to the objectives and non-negotiable values of a single church”).

crucifix as a secular symbol. Italian cultural usage—or, rather, lack thereof—confirms that the crucifix has not acquired any secular meaning that is independent of its ordinary Catholic confessional meaning.

III. CROSS, CRUCIFIX, AND CULTURATION

The decisions in *Buono* and *Lautsi* each rest on two premises. First, they expressly acknowledge that the cross and the crucifix each ordinarily have confessional meaning.²³⁶ Second, they implicitly assume that the State's adopting or endorsing this religious or confessional meaning would be unconstitutional; this is evident from *Buono*'s assertion of an extraordinary secular meaning for the cross when displayed at veterans memorials,²³⁷ the Italian courts' assertion of extraordinary meanings for the crucifix when displayed in public school classrooms,²³⁸ and *Lautsi*'s extraordinary assertion that the crucifix has no confessional meaning or effect at all in an Italian public school.²³⁹ These premises are also evident in each decision's assertion of an extraordinary meaning for each symbol: honor and memory of *all* military dead, in case of *Buono* and the cross, and the Christian-Catholic roots of universal human rights and Italian culture (to which the ECtHR deferred under the margin of appreciation doctrine), in case of *Lautsi* and the crucifix. These alternate secular meanings are not obvious from their ordinary confessional counterparts—indeed, they subvert or deny the symbol's theological significance. Of course, if the confessional meanings were not constitutionally problematic, there would have been no need to substitute the less obvious secular meanings adopted by the USSCt and the Italian courts, or to deny confessional meaning altogether, as did the ECtHR.

Buono and *Lautsi* defend the alternate secular meanings for the cross and the crucifix in two ways. First, they deemphasize the ordinary religious or confessional meaning of the symbols; because such meanings undermine the plausibility of any alternate secular meaning, a court that intends to uphold the symbol gains nothing by emphasizing its

236. See *supra* Parts II.A.1, II.B.1.

237. See *supra* Part II.A.2.

238. See *supra* Parts II.B.2.a–b.

239. See *supra* Part II.B.2.c.

confessional content. And second, they erase the effect of the cross and the crucifix. *Buono* does this by suggesting that there is no Establishment Clause harm—that is, no legally cognizable “endorsement” effect—if the symbol conveys a secular message.²⁴⁰ *Lautsi* accomplishes the same thing more directly, emphasizing the crucifix’s “passivity” and the lack of any evidence that non-Catholic children were treated badly or differently in Italian classrooms where the crucifix is displayed.²⁴¹

But merely positing a possible secular meaning for a confessional symbol is hardly decisive of the constitutional question: The government can nearly always articulate a possible secular meaning for the ordinarily confessional symbols that it uses. What matters is not the *possibility* of an alternate secular meaning, but its actual *existence*—not whether a secular meaning is imaginable, but whether it is present and recognizable in the history and culture of the society in which it is displayed.²⁴² The meaning of a sign is in principle indeterminate, but it does not follow, as judges sometimes suppose,²⁴³ that a sign can mean

240. See *supra* Part II.A.2.

241. See *supra* Part II.B.2.c.

242. See *supra* Part I.C.

243. See, e.g., *Pleasant Grove City v. Summum*, 555 U.S. 460, 474–76 (2009) (Alito, J., plurality opinion) (arguing the impossibility of determining a city monument’s meaning).

Although it did not raise any Establishment Clause issues, *Summum* did suggest that a government which accepts the private donation of a religious monument does not necessarily adopt the religious motivation of the donor or the religious meaning the donor might ascribe to the donated symbol. 555 U.S. at 474, 476. Our approach is consistent with this holding. We have argued that in evaluating government use of religious symbols under the Establishment Clause, courts should determine (i) whether a symbol appropriated by government has an ordinary confessional or religious meaning, (ii) whether there exists a plausible alternate secular meaning; and (iii) whether that alternate meaning is authentic—that is, truly present in the history or culture of the place where the symbol is displayed. See *supra* text accompanying notes 13–15 and Part I. Our analysis does not conclusively presume that the Latin cross in *Buono* could only have had Christian meaning, nor would we have conclusively presumed a confessional or religious meaning for the Ten Commandments monument in *Summum* (if the Establishment Clause had been at issue in that case). Though the symbols at issue in both cases possessed an ordinarily confessional or religious meaning, plausible secular meanings were offered by the government in each case—honoring the sacrifices of members of the service fallen in battle, in *Buono*, and recognizing those groups which are important to the city’s current life or past history, in *Summum*. The critical inquiry in both cases was the

anything.²⁴⁴ The meaning of a sign is specified by its overall context—not just the immediate context in which it is displayed (a veterans memorial, a public school classroom),²⁴⁵ but also the history and culture of the place where it is displayed (the United States, Italy).²⁴⁶

As we have seen, the purported secular meanings asserted for the cross and the crucifix are culturally inauthentic. The cultural histories to which the courts appeal in their respective efforts to prove these secular meanings obscure a predominant confessional meaning, and one cannot find unbelievers or minority believers in either the United States or Italy who themselves use these symbols in a manner that would confirm the secular meanings that courts have projected onto them.²⁴⁷

The cross may be a commonly displayed cultural symbol in the United States, and the crucifix such a symbol in Italy, but it does not follow that they are *secular* symbols. Rather, they are remnants of a once-predominant Christian culture (Protestant in the United States, Catholic in Italy) that no longer exists as it once did. As sociological data makes clear, both cross and crucifix have become “deculturated,” alienated from the culture where they once enjoyed a natural and privileged place. As Professor Beaman has pointed out, deculturation explains the ironic self-presentation of these traditionally dominant religions as embattled cultural minorities.²⁴⁸

In short, neither cross nor crucifix is any longer culturally at home as a *confessional* symbol. The United States is no longer a predominantly Protestant culture, and is fading as a seriously Christian one. For example, the newly elected president of the Southern Baptist

third part of our approach, whether these proffered secular meanings are authentic as well as merely plausible—that is, truly present in the history and culture of the place displaying the symbol.

As we have concluded, there is no basis for believing that the meaning ascribed to the cross by the *Buono* plurality is really present in United States history and culture, as evidenced by the fact that it does not honor nonbelievers and nonChristians; whether the Ten Commandments signify a group that currently or historically is important to the city in *Summum* would have been a matter for investigation had that case been decided under the Establishment Clause.

244. See *supra* text accompanying notes 43–45.

245. See *supra* Parts II.A.2, II.B.2.

246. See *supra* Parts II.A.3, II.B.3.

247. See *supra* Parts II.A.3, II.B.3.

248. Beaman, *supra* note 10, at 90.

Convention's Ethics and Religious Liberty Commission, Russell Moore, has declared that evangelicals "are no longer the moral majority," but a "prophetic minority."²⁴⁹ Self-declared Protestants now constitute a bare majority of adults in the United States,²⁵⁰ and Christianity (especially evangelical Protestantism) is declining as a major American cultural influence.²⁵¹ Non-Christians, unaffiliated believers, and unbelievers now constitute over a fifth of the population,²⁵² and have more than doubled in the just the last two decades. The trend is starker among young people: Only four in ten young adults ages 18 to 29 self-identify as Protestant, and one in four is either an unbeliever or unaffiliated with a religion.²⁵³ Perhaps most telling, large majorities of Americans do not believe that their religion is the only way to heaven, or that there is significant conflict between belief and contemporary secular society.²⁵⁴

249. Naomi Schaefer Riley, *Russell Moore: From Moral Majority to "Prophetic Minority,"* WALL ST. J., Aug. 17, 2013 ("Mr. Moore is among the leaders of a new generation who think that evangelicals need to recognize that their values no longer define mainstream American culture the way they did 50 or even 20 years ago," and who believe "that Christians must return to the days when they were a moral example and vanguard—defenders of belief in a larger unbelieving culture.").

250. *U.S. Religious Landscape Survey, Report 1: Religious Affiliation-Summary of Key Findings*, PEW FORUM ON RELIGION & PUBLIC LIFE 5 (June 2008) [hereinafter *Religious Affiliation Survey Findings*], available at <http://religions.pewforum.org/pdf/report-religious-landscape-study-key-findings.pdf>. For the full report, see <http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf>.

251. See HUNTER, *supra* note 38, at 79–92.

252. *Religious Affiliation Survey Findings*, *supra* note 250, at 5 (summing percentages for "Other Religions" (4.7%) and "Unaffiliated" (16.1%)).

253. *Religious Affiliation Survey Findings*, *supra* note 250, at 7.

254. *U.S. Religious Landscape Survey, Report 2: Religious Beliefs & Practices/Social and Political Views-Summary of Key Findings*, PEW FORUM ON RELIGION & PUBLIC LIFE, 3–4 [hereinafter *Religious Beliefs Survey Findings*] (June 2008), available at <http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf>; accord ROBERT D. PUTNAM & DAVID CAMPBELL, *AMERICAN GRACE: HOW RELIGION DIVIDES AND UNITES US* 80–133 (2010) (arguing that the dramatic increase in disaffiliation and unbelief in young adults is a reaction to conservative Christian political activism in the 1980s and 1990s). For the full Pew report, see <http://religions.pewforum.org/pdf/report2-religious-landscape-study-full.pdf>.

Though Italy is among the more religious of the EU countries,²⁵⁵ its culture is also secularizing, as evidenced by large and growing gaps between Italian practice and Catholic teachings. Rates of Catholic baptisms, first communion, confirmation, and marriages have shown substantial declines in just the last 15 years.²⁵⁶ These data on so-called Catholic “rites of passage” are far more telling than frequently cited figures about attendance at mass (which, in any event, has also dropped precipitously over the last generation). Another clear indicator is the radically new understanding of “family” in Italian society: The data point to

the emergence of a new family model in Italy, which is completely opposite to the one promoted by the Catholic Church. There are increasing numbers of couples without children, single parents, and divorced parents who remarry or choose to cohabit. Family formation is changing and following the pattern of other advanced Western countries.²⁵⁷

An overwhelming majority of Italian Catholics opposes Church intervention in Italian politics,²⁵⁸ and the result of most referenda relating to practices opposed by the Church has been rejection of the Catholic position.²⁵⁹

In short, “a process of secularization is taking place in Italy that is slow but continuous. The process of transformation is oriented towards a more flexible attitude in applying the Catholic precepts and sometimes a growing disinterest towards these precepts by the Italian people.”²⁶⁰

255. See, e.g., Barry Kosmin, *France, Italy and Spain: Political Secularism and Public Opinion*, in *SECULARISM, WOMEN & THE STATE: THE MEDITERRANEAN WORLD IN THE 21ST CENTURY* 29, 32–33 (2009) [hereinafter *SECULARISM*].

256. Silvia Sansonetti, *Social Indicators of Secularization in Italy*, in *SECULARISM*, *supra* note 255, at 137–39.

257. Sansonetti, *supra* note 256, at 140. See also R. CARTOCCI, *GEOGRAFIA DELL’ITALIA CATTOLICA* (2011).

258. Kosmin, *supra* note 255, at 35.

259. See Sansonetti, *supra* note 256, at 140.

260. Sansonetti, *supra* note 256, at 149.

Both the United States and Italy are confronted with increasing secularization and growing demands from believers, unbelievers, faith communities, and other groups that government take into account specific aspects of their belief or unbelief when it acts—especially when it adopts or displays symbols. A paradox is evident: On the one hand, there is a growing national “identitarian” narrative, focused on a presupposed confessional identity or affiliation of the people with “Judeo-Christianity” in the United States and Roman Catholicism in Italy, while on the other, statistical data confirm the steady secularizing of individual behavior and the widening gulf between these purported identifications and popular culture. The triumphant “return of religion” has not in reality been confirmed by empirical data on religious practice and belief.

As Professor Roy has shown, “religion” is now less a *faith* than a *cultural* phenomenon.²⁶¹ We see this in both *Buono* and *Lautsi*. The confessional elements of both cross and crucifix are losing their cultural salience—it can no longer be assumed, in other words, that the confessional referent of each sign is widely accepted and approved by Americans and Italians. As a consequence, the government could not defend its use of cross or crucifix on the basis of its confessional meaning. Defenses of each symbol sought instead to “re-acculturate” it, by turning it into a secular symbol that is at home in the secularizing cultures of the United States and Italy.

The importance of careful cultural analysis is well illustrated by Professor Weiler’s argument before the ECtHR’s Grand Chamber on behalf of eight intervening countries in *Lautsi & Others*,²⁶² widely credited with persuading the Grand Chamber to overturn the prior Second Section decision invalidating classroom display of the crucifix.²⁶³ Like the Italian lower courts, Weiler spent most of his argument talking about religious symbols other than the crucifix. He noted the wide range of practices with respect to government use of religious language and symbols in Europe—established churches, constitutional invocations of

261. See Part I.C.

262. See Joseph Weiler, “Oral Submission on Behalf of Armenia, Bulgaria, Cyprus, Greece, Lithuania, Malta, Russia, and San Marino” (June 30, 2012), available at <http://icon.oxfordjournals.org/content/8/2/157.full>; *Lautsi & Others*.

263. See, e.g., Pierre-Henri Pr  lot, *The Lautsi Decision as Seen from (Christian) Europe*, 65 ME. L. REV. 783 (2013); *Lautsi & Others*.

the Trinity, crosses on national flags—the last especially powerful because national flags are simultaneously object and source of nationhood.²⁶⁴ He argued for a kind of group pluralism—a plurality of responses among nations, thus inviting the Court’s application of the margin of appreciation doctrine,²⁶⁵ and ignoring the powerful constitutional convergence trends documented by Professors Annichino, Silvio Ferrari, and Haupt, among others.²⁶⁶

Within the “non-laique” or confessional states he represented (which notably did not include a single predominantly Protestant nation), Weiler argued, “the continued entanglement of religious symbols in its public square and by the State is accepted by the secular population as a part of national identity and as an act of tolerance towards their co-nationals,” this latter presumably a reference to those practicing the historically dominant Roman Catholicism or Christian Orthodoxy in such countries.²⁶⁷ There is no doubt that crosses on national flags have authentic—and by now close to exclusive—nonconfessional, secular meaning. Unbelieving and most non-Christian Norwegians and Finns and English who trek to the World Cup or the Olympics seem not to have any qualms about waving the symbol of their country—cross and all—in support of national teams and athletes. Like the Christmas tree, crosses on national flags are symbols whose ordinary confessional meaning has long since been displaced by an alternate secular one, easily confirmed by this ubiquitous use by unbelievers and non-Christians.

But has the *crucifix* achieved this status? Weiler didn’t say, and offered no evidence that it has. He argued that the “message of tolerance towards the Other” properly written into the European Convention “should not be translated into a message of intolerance towards *one’s own identity*,” suggesting that removing crucifixes from public school classrooms would have precisely that effect for Italians.²⁶⁸ But this

264. Weiler, *supra* note 262, at ¶¶ 12–13.

265. Weiler, *supra* note 262, at ¶ 15.

266. See, e.g., Annichino, *supra* note 6, at 182–83; Silvio Ferrari, *The Strasbourg Court and Article 9 of the European Convention of Human Rights: A Quantitative Analysis of the Case Law*, in THE LAUTSI PAPERS, *supra* note 11, at 14, 29 [hereinafter S. Ferrari, THE LAUTSI PAPERS]; Haupt, *Transnational Establishment*, *supra* note 2.

267. Weiler, *supra* note 262, at ¶ 15.

268. Weiler, *supra* note 262, at ¶ 16 (emphasis added).

begged the question before the court: Of whose identity did he speak? Which Italians? Baptist, Buddhist, Jehovah's Witness, Jewish, Mormon, Muslim, and other non-Catholic and unbelieving Italians, of whom there are ever increasing numbers? Unless there is an alternate nonconfessional meaning for the crucifix that is authentically present and genuinely recognized in Italian culture, the "lost identity" of which Weiler so passionately spoke is not that of the Italian people, but only that of Italian Catholics and their Church.

Weiler invoked the timeworn argument that absence of government-displayed symbols equates to government endorsement of unbelief, using a homely analogy of "Marco," whose atheist/agnostic family intentionally lacks a crucifix, and "Leonardo," whose believing Catholic family cannot imagine their home without one. Weiler thus encouraged the European Court of Human Rights to conclude that Marco and Leonardo would both understand their public school to have endorsed atheism if it lacked crucifix.²⁶⁹

The Italian state, of course, is not a private actor whose influence is confined to a single household like Weiler's fictional families; the Italian state acts for all its citizens, as must all liberal democratic states.²⁷⁰ Weiler, again, does not explain how a state's use of a confessional symbol that lacks an alternate, nonconfessional meaning in Italian history and culture can represent dissident Catholic, non-Catholic, and unbelieving Italians.²⁷¹

In a narrow sense, Weiler's efforts in *Lautsi* and similar arguments in *Buono* were successful: The memorial cross was allowed to stay (for the present) in *Buono*, as was the classroom crucifix in *Lautsi*; "religion" lives on for another day in the public square. But there is no actual U.S. culture, no real society, in which the cross possesses the *secular* meanings attributed to it by the USSCt. Nor is there any actual Italian culture, or real society, in which classroom display of the crucifix reflects the open and welcoming nonconfessional "tradition" of which the Italian courts spoke and to which the Grand Chamber deferred under the margin of appreciation.

269. Weiler, *supra* note 262, at ¶¶ 25–27.

270. See S. Ferrari, *THE LAUTSI PAPERS*, *supra* note 266, at 29; Haupt, *Transnational Nonestablishment*, *supra* note 2, at 1028–29.

271. See Weiler, *supra* note 262.

Similar arguments can be made against the position taken by Professor Cardia, who served as a consultant to the Italian government in preparing the Italian government's submission to the Grand Chamber.²⁷² Like the Italian courts, Cardia dubiously concludes that "the symbol of the cross"—as in the Italian court decisions "crucifix" seems to disappear—"does not belong to one church or another: It belongs to Christianity, to the faith of each of us, even to the heart of one who, lacking other faiths, recognizes its universal meaning."²⁷³

A pretense of "reacculturation" is at work here, a shallow trivialization and stereotyping of formerly powerful religious narratives symbolized by the cross and the crucifix, effected by attributing nonconfessional meaning to obviously confessional symbols and embedding that meaning in a nonexistent, imaginary "culture" so as to create the illusion of acculturation.

Part of the impulse to this "synthetic" re-acculturation is understandably strategic: By attributing secular meaning to religious symbols, confessional groups and their advocates show courts how to defend government use of these symbols, and thus also how to preserve an apparent union of religion and national culture.²⁷⁴ These efforts also betray a kind of cultural schizophrenia: Many believers—and especially the leaders of conservative Christian confessions—rail against the secularization of culture and its subversion of belief, yet they insist that their symbols and the confessional beliefs they signify are still at home in this ever more secular and unbelieving culture. But these symbols continue to fit, if at all, only as something *other than the confessional symbols they are*—hence the redefinition of such symbols as secular *even and especially* by the religions that use them and with which they have traditionally been associated.

Most ironic is the likelihood that judicial re-definition of religious symbols as secular will actually accelerate and entrench the secularization that traditionally dominant religions deplore.²⁷⁵ As

272. See *supra* notes 146–147 and accompanying text.

273. CARDIA, *supra* note 11, at 137 (commenting on the Second Section opinion) (authors' translation).

274. Bartrum, *supra* note 11, at 1662–63.

275. See Scharffs, *supra* note 32, at 58; Berg, *supra* note 7, at 42–43 ("An obvious distortion or dilution of religion occurs if courts validate religious symbolic displays on the ground . . . that the displays have no religious meaning or serve

Professor Roy has concluded, the challenge is not a “clash between different cultures, it is a separation of culture and religion.”²⁷⁶

CONCLUSION: ACCULTURATION OR WITNESS?

James Davison Hunter has argued that

[t]he goal for Christians . . . is not and never has been to “take back the culture” or to “take over the culture” or to “win the culture wars” or to “save Western civilization.” Ours is now, emphatically, a post-Christian culture, and the community of Christian believers are now, more than ever—spiritually speaking—exiles in a land of exile. Christians, as with the Israelites in Jeremiah’s account, must come to terms with this exile.²⁷⁷

The temptation to dominate and politicize culture, Hunter continues, transforms “Christian public witness into the opposite of the witness Christianity is supposed to offer.”²⁷⁸ Creating disingenuous accounts of imaginary history and inventing secular meanings that have no cultural existence do not serve as Christian witness, but as ironic and cynical manipulation.

Professor Berg has concluded that if allowing the state to define the meaning of religious symbols will inevitably end in their

merely a historical or ceremonial function.”); S. Ferrari, *supra* note 2, at 16–17 (“[A] cultural defense of the crucifix implicitly devalues its religious significance and, indirectly, endorses the principle that a symbol can be displayed in a public institution only if the symbol has no religious character.”); cf. Hill, *Ceremonial Deism*, *supra* note 12 (arguing that religious phrases and symbols have lost their religious meaning through repeated display and use).

276. ROY, *supra* note 38, at 115.

277. HUNTER, *supra* note 38, at 280; accord Riley, *supra* note 249 (noting a “new generation” of evangelical leaders “who think that evangelicals need to recognize that their values no longer define mainstream American culture the way they did 50 or even 20 years ago,” and who believe “that Christians must return to the days when they were a moral example and vanguard—defenders of belief in a larger unbelieving culture”).

278. HUNTER, *supra* note 38, at 280.

secularization, “then the only way for the state to acknowledge its limits is by remaining silent and leaving statements about transcendent reality to the initiative of private individuals and groups in civil society.”²⁷⁹ We agree, and believe this would be a salutary development for religion as well as government. Religion’s conceding and cooperating with government in the desacralizing of sacred symbols will only dilute the authentic testimony of religions and believers who are already estranged from Western culture. In this respect, *Buono* and *Lautsi* were anything but good news for belief.

279. Berg, *supra* note 7, at 47.